National Energy Board | Office national de l'énergie

Reasons for Decision

Terasen Pipelines (Trans Mountain) Inc.

OH-1-2006

October 2006

Facilities

Canada

2007-00309

National Energy Board

Reasons for Decision

In the Matter of

Terasen Pipelines (Trans Mountain) Inc.

Section 52 Application dated 17 February 2006, for the TMX - Anchor Loop Project

OH-1-2006

October 2006

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Glossary of Terms and Abbreviations

Act or NEB Act	*National Energy Board Act*
AEP	Aboriginal Engagement Program
apportionment	the method of allocating the difference between the total nominated volume and the available pipeline operating capacity, where the later is smaller
BC MOE	Province of British Columbia Ministry of Environment
b/d	barrels per day
Board or NEB	National Energy Board
CAPP	Canadian Association of Petroleum Producers
CEA Act or CEAA	*Canadian Environmental Assessment Act*
CPM	Computation Pipeline Monitor
CSA	Canadian Standards Association
CSA Z662	CSA standard Z662-03, Oil and Gas Pipeline Systems
DESR or Draft ESR	*Draft Environmental Screening Report*
DFO	Fisheries and Oceans Canada
EAI Report	Energy Analysts International Report
ENGOs	environmental non-government organizations
EPP	Environmental Protection Plan
ESR	*Environmental Screening Report*
Filing Manual	*National Energy Board Filing Manual, 2004*
GIC	Governor in Council
Ha	hectare
HDD	horizontal directional drilling
heavy crude oil	a collective term that includes conventional heavy crude oil and bitumen
IDESR or Interim Draft ESR	*Interim Draft Environmental Screening Report*
ITS	Incentive Tolling Settlement

JNP	Jasper National Park
km	kilometre(s)
KP	kilometre post
KPa	kilopascal(s)
m	metre(s)
MPa	megapascal(s)
MLVB	mainline block valve
mm	millimetre(s)
MOP	maximum operating pressure
MOU	Memorandum of Understanding
MRPP	Mount Robson Provincial Park
m^3/d	cubic metres per day
netback	the per unit price received by a producer from the sale of crude oil, less applicable costs including transportation and marketing fees
NHMD	Natural Hazards Management Database
OD	outside diameter
OPR-99	*Onshore Pipeline Regulations, 1999*
PCA	Parks Canada Agency
PCC	Primary Control Centre
PESR or Preliminary ESR	Preliminary Environmental Screening Report
PPBoR	plan, profile and book of reference, as set out in section 33 of the NEB Act
RA	in relation to a project, a responsible authority (RA) is a federal authority that is required, pursuant to subsection 11(1) of the Canadian Environmental Assessment Act, to ensure that an environmental assessment of the project is conducted
RoW	right-of-way
SCADA	Supervisory Control and Data Acquisition

SFN	Simpcw First Nation
shipper	the party that contracts or nominates volumes on a pipeline for transportation service
synthetic crude oil	a mixture of hydrocarbons, similar to crude oil, derived by upgrading bitumen from oil sands
TAN	total acid number
TLRUS	traditional land and resource use study
TMPSE Project	Trans Mountain Pump Station Expansion Project
UNESCO	United Nations Educational, Scientific and Cultural Organization
WCSB	Western Canada Sedimentary Basin
WTI	West Texas Intermediate; a light sweet crude oil produced in the U.S. that is commonly used as a benchmark for North American crude oil price quotations

Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* (the NEB Act or the Act) and the regulations made thereunder;

IN THE MATTER OF an application dated 17 February 2006 by Terasen Pipelines (Trans Mountain) Inc. for a Certificate of Public Convenience and Necessity under section 52 of the Act for the authorization to construct and operate the TMX – Anchor Loop Project; and

IN THE MATTER OF National Energy Board Hearing Order OH-1-2006, dated 19 April 2006.

HEARD in Calgary, Alberta on 8, 9 and 10 August 2006.

BEFORE:

J.S. Bulger	Presiding Member
G. Caron	Member
R. George	Member

Appearances	**Participants**	**Witnesses**
D.A. Holgate D.P. Langen	Terasen Pipelines (Trans Mountain) Inc.	T. Antoniuk T. Griffin J.D. Hair H. Harden H. Heffler W. Henderson M. Horner P. Huddleston J. Leto B. McClellan B. Nooyen D. O'Rourke P. Reicher J. Smith
N.J. Schultz	Canadian Association of Petroleum Producers	
K. Hughes	Chevron Canada Limited	
C. Fredericks	ConocoPhillips Canada Limited	
R.R. Moore	Imperial Oil Resources Limited	
J. Pendrel	Nexen Inc.	

Appearances	Participants	Witnesses
L. Rosko	Shell Canada Limited	
M. Barr A. Lalji	Simpcw First Nation	Chief K. Matthew
D. Mueller	Fisheries and Oceans Canada	
D. Mueller	Parks Canada Agency	R. Hooper N.J. Olyslager I. Thomas
S.M. Bates	Province of British Columbia – Ministry of Energy, Mines and Petroleum Resources	
M. Yuzda M. Fowke	National Energy Board	

Chapter 1

Introduction

On 17 February 2006, Terasen Pipelines (Trans Mountain) Inc. (Terasen or the Applicant) applied to the National Energy Board (the Board or NEB) pursuant to section 52 of the *National Energy Board Act* (the NEB Act), for a Certificate of Public Convenience and Necessity for the TMX – Anchor Loop Project (the Project). The Project would consist of a pipeline loop and associated facilities extending from Hinton, Alberta to a location near Rearguard, British Columbia (BC). The Project generally parallels the existing Trans Mountain right-of-way (RoW) through Jasper National Park (JNP) and Mount Robson Provincial Park (MRPP).

The Project would include the construction and operation of 7.6 km of 762 mm (30-inch) outside diameter (OD) pipe from west of Hinton, Alberta (kilometre post (KP) 310.1) to the Hinton Pump Station (KP 317.7) and 151 km of 914 mm (36-inch) diameter pipe from the Hinton Pump Station to a location near Rearguard, BC (KP 468.0). The Project would also include the installation of two new electric drive pump stations: one in Alberta at KP 188.0 named Wolf; and one in BC at KP 555.5 named Chappel.

Terasen submitted that the purpose of the Project was to address existing capacity constraints on the Trans Mountain pipeline and to increase the ability of Canadian producers and marketers of crude oil and refined products to access west coast markets. The Project would provide an incremental capacity of 6 360 m^3/d (40,000 b/d), which, in conjunction with the Board's November 2005 approval of the Trans Mountain Pump Station Expansion Project (TMPSE Project), would increase the total capacity of the Trans Mountain system to 47 690 m^3/d (300,000 b/d) by the third quarter of 2008.

The Board decided to consider the application in an oral public hearing and on 19 April 2006 issued Hearing Order OH-1-2006, which established the process for the Board's consideration of the Application.

The Project requires a Certificate of Public Convenience and Necessity under section 52 of the NEB Act, and thus triggers the requirement for an environmental screening under the *Canadian Environmental Assessment Act* (CEA Act). Based on a project description filed by Terasen in April 2005, the Board and other Responsible Authorities (RAs) each determined that the Project was subject to a screening level assessment under that Act. Since the Project does not require more than 75 km of new RoW, a comprehensive study under the CEA Act was not required.

To reduce potential duplication in the environmental assessment process, the Board, other RAs, and the provincial departments with an environmental assessment responsibility, worked together to create a coordinated screening process that would meet the needs of each in their environmental assessments.

On 31 May 2006, the Board issued a *Preliminary Environmental Screening Report* (PESR or Preliminary ESR). The report was prepared to assist other RAs and government departments

having legislated environmental assessment responsibilities for the Project in preparing their submissions to the NEB and to minimize the potential for duplication of effort in the assessment of the Project. The PESR was also intended to inform the public by summarizing the evidence filed to that date about the Project.

On 15 June 2006, the Board issued a letter announcing that the hearing would be held in the Board's Hearing Room in Calgary, Alberta.

On 31 July 2006, the Simpcw First Nation (SFN) filed a letter with the Board, other RAs and government departments having an environmental assessment responsibility for the Project. The letter set out the expectations of the SFN with regard to Crown consultation and requested that all environmental assessment proceedings and undertakings cease and that the environmental assessment proceed by way of Panel Review.

On 3 August 2006, the Board announced that, as a preliminary matter at the start of the proceeding, the Board would hear oral argument from parties on the request by the SFN, including the grounds supporting the request and the relief sought.

On 3 August 2006, the SFN filed a Notice of Motion with the Board requesting an order:

- re-opening and extending the deadlines set out in the Hearing Order by six months to allow the SFN to ask information requests, file evidence and cross-examine other parties;
- indicating that the Board will convene a hearing at the Simpcw First Nation to allow the SFN to call its own witnesses and cross-examine witnesses of the other parties who will have already appeared before the Board; and
- providing that the Board will not grant regulatory approvals under the NEB Act or the CEA Act until the SFN had concluded its submissions to the Board and had an opportunity to cross-examine the other parties.

On 4 August 2006, the Board provided additional direction and informed parties that, at the start of the hearing, it would hear argument on the Motion, including the grounds supporting the Motion and the relief sought by the SFN. The Board stated that, once it had heard from all parties on these issues, the Board would then make a decision as to how it would proceed.

The oral public hearing was held on 8, 9, and 10 August 2006. The Board heard the Motion by the SFN on 8 and 9 August 2006. Since no party argued that the remainder of the hearing should not proceed as planned, the Board re-commenced with the hearing on 9 August 2006 and stated that, depending on the Board's ruling on the SFN Motion, the hearing could be reopened at a later date.

On 17 August 2006, the Board released an *Interim Draft Environmental Screening Report* (IDESR or Interim Draft ESR). The Board invited submissions on the IDESR from Parks Canada Agency (PCA), other RAs and other government departments with environmental assessment obligations, and noted that any party who wished to submit comments on the IDESR could make its submissions to the NEB.

The Board issued its ruling denying the SFN Motion by letter dated 24 August 2006. This ruling is reproduced in its entirety in Appendix II of these Reasons for Decision.

On 18 September 2006 the Board released for public comment a *Draft Environmental Screening Report* (DESR or Draft ESR) incorporating comments provided by PCA, Transport Canada, Fisheries and Oceans Canada, Environment Canada, and the British Columbia Ministry of Environment (BC MOE).

The final Environmental Screening Report (ESR), which was issued with the Board's CEA Act determination on 19 October 2006, incorporates the comments received on the Draft ESR and provides the views of the Board and the Board's determination under the CEA Act.

Chapter 2

Facilities

2.1 Appropriateness of the Design

2.1.1 Current and Proposed Operation

The existing Trans Mountain pipeline consists of 1 146 km of 610 mm (24-inch) OD pipe and transports petroleum and refined products from Edmonton, Alberta to Burnaby, BC. The Trans Mountain pipeline was constructed in 1953 and has been modified over the years to ship a variety of crude oils and refined products and to respond to changing customer needs. The Trans Mountain pipeline currently has eleven pump stations, five in Alberta and six in BC. The TMPSE Project, approved on 9 November 2005 by Board Order XO-T099-15-2005, would increase the number of pump stations on the system from 11 to 21 pump stations by April 2007.

As shown in Figure 2-1, the applied-for Project would loop the existing Trans Mountain pipeline system. The looping would start just west of Hinton, Alberta and end at a location near Rearguard, BC, known as Hargreaves. The Project would also consist of the installation of two electric drive pump stations (Wolf and Chappel), two scraper-trap facilities and 21 Mainline Block Valves (MLBVs) along the length of the Project. The existing 610 mm (24-inch) pipe from KP 310.1 to KP 468.0 and the Niton Pump Station would also be deactivated as part of the Project. The proposed deactivation would be part of a separate application to the Board to be filed at a later date.

Once the Project is completed, the capacity of the Trans Mountain pipeline would be increased by 6 360 m^3/d (40,000 b/d) to a total average daily capacity of 47 690 m^3/d (300,000 b/d). The total capacity includes the additional capacity to be provided by the TMPSE Project.

2.1.2 Pipeline Loop

The Project would include the construction of two pipeline loop segments, totaling a length of 158 km. The first loop segment would consist of 7 km of 762 mm (30-inch) pipe and would extend from west of Hinton at KP 310.1 to the Hinton Pump Station at KP 317.7. The second loop segment would consist of 151 km of 914 mm (36-inch) pipe and would extend from the Hinton Pump Station to a location near Rearguard, BC at KP 468.0. See Figure 2-2 for the location of the segments.

The specifications for the pipelines are summarized in Table 2-1.

Figure 2-1
Trans Mountain Pipeline System and Proposed TMX Anchor Loop Project

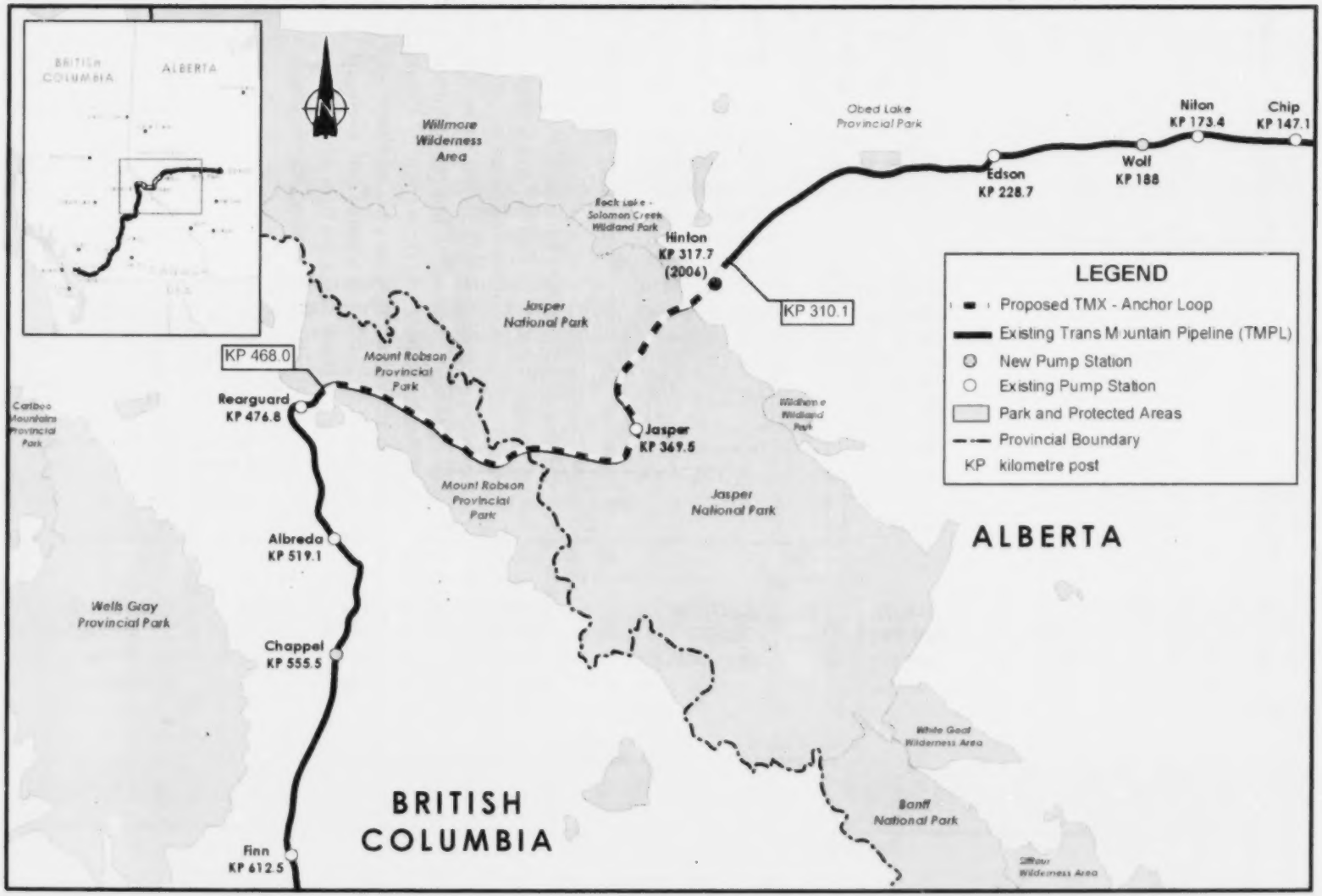

Figure 2-2
TMX - Anchor Loop Project Schematic

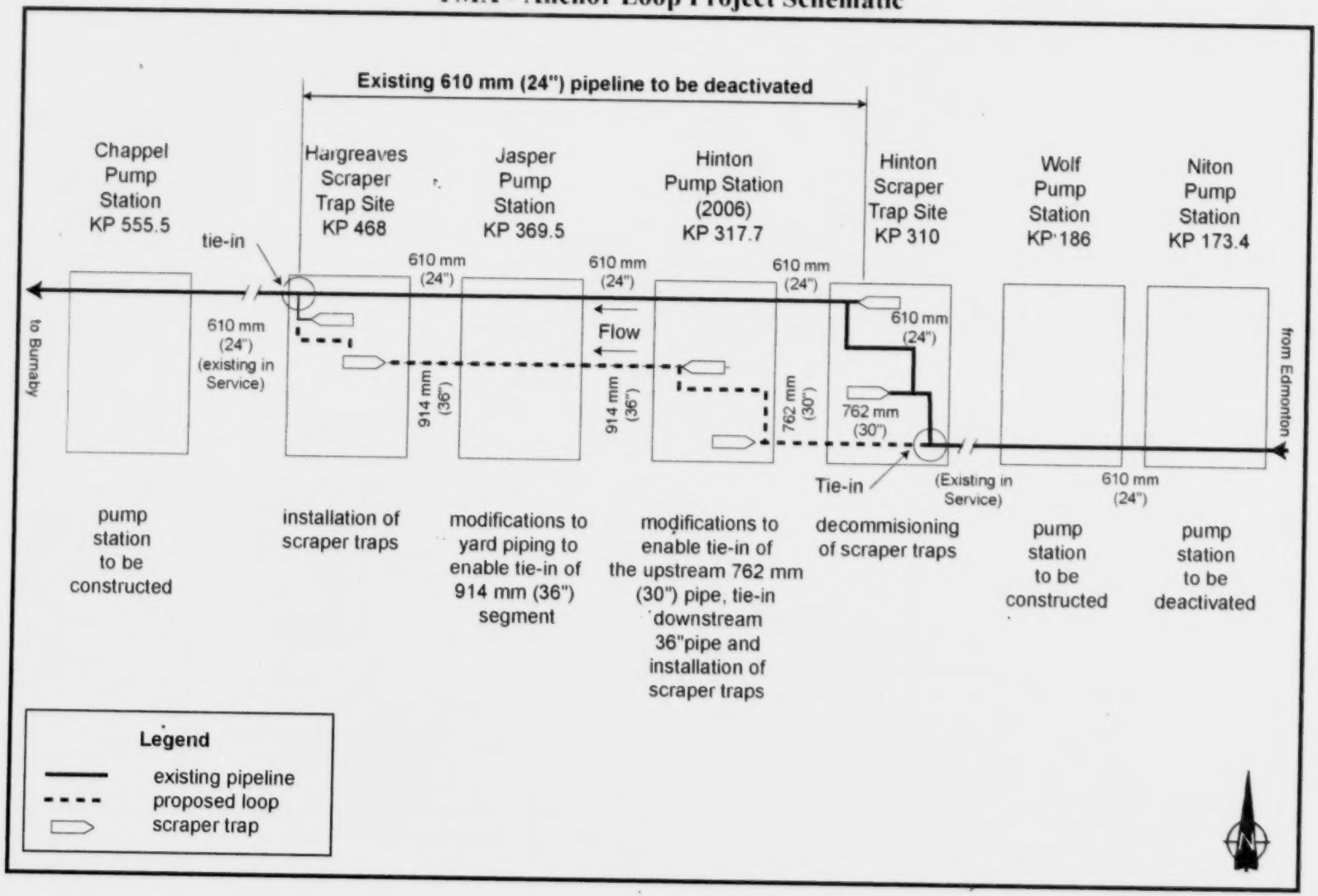
Existing 610 mm (24") pipeline to be deactivated
Chappel Pump Station KP 555.5
Hargreaves Scraper Trap Site KP 468
Jasper Pump Station KP 369.5
Hinton Pump Station (2006) KP 317.7
Hinton Scraper Trap Site KP 310
Wolf Pump Station KP 186
Niton Pump Station KP 173.4
tie-in
610 mm (24")
610 mm (24")
610 mm (24")
610 mm (24")
610 mm (24") (existing in Service)
Flow
914 mm (36")
914 mm (36")
762 mm (30")
762 mm (30")
to Burnaby
from Edmonton
Tie-in
(Existing in Service)
610 mm (24")
pump station to be constructed
installation of scraper traps
modifications to yard piping to enable tie-in of 914 mm (36") segment
modifications to enable tie-in of the upstream 762 mm (30") pipe, tie-in downstream 36"pipe and installation of scraper traps
decommisioning of scraper traps
pump station to be constructed
pump station to be deactivated
Legend
existing pipeline
proposed loop
scraper trap
N

Table 2-1
Pipe Specifications for TMX Anchor Loop Project

	Loop 1 (KP 310.1 to KP 317.7)	Loop 2 (KP 317.7 to KP 323.4)	Loop 2 (KP 323.4 to KP 343.9)	Loop 2 (KP 343.9 to KP 468)
Pipe Diameter (mm)	762	914	914	914
Length (km)	7.6	5.7	20.5	124
Grade (MPa)	359	359	359	359
Category	I	I	I	I
Maximum Operating Pressure (kPa)	9930	9930	10875	9930
Minimum Wall Thickness (mm)	9.8	11.8	13.1	11.8
Pipe Coating	Fusion bond epoxy	Fusion bond epoxy	Fusion bond epoxy	Fusion bond epoxy
Joint Coating	Liquid epoxy	Liquid epoxy	Liquid epoxy	Liquid epoxy

2.1.2.1 Pipe Wall Thickness

Terasen stated that the wall thickness of the new pipeline sections would meet the minimum specifications outlined in Table 2-1. Heavier walled pipe would be used at road crossings, railway crossings, and at major stream crossings. For the segment of pipe extending from KP 323.4 to KP 343.9, the maximum operating pressure (MOP) would be higher in order to account for low upstream and downstream pipe elevations and respective fluid head pressure. Heavy wall pipe (13.1 mm) would be used to address higher MOP for this segment. In addition, heavy wall pipe would be used for segments of the pipeline that may be affected by the potential twinning of Highway 16. Terasen noted that the length of segments requiring the application of heavy wall pipe, and the wall thickness would be determined during the detailed design phase and that the details would be provided to the Board at that time.

Views of Parties

BC MOE was of the view that the pipe should have a wall thickness of 12.9 mm for all water crossings that connect to important habitats or major water bodies. BC MOE submitted that this additional mitigation was necessary because the Project would pass through a provincial park and a national park, and therefore, a higher standard of care should be required.

2.1.2.2 Category of Pipe

Terasen proposed that the new pipe sections for the Project would be composed of Category I pipe to comply with the notch toughness requirements of Canadian Standards Association Z662, Oil and Gas Pipeline Systems, (June 2003) (CSA Z662-03) for pipelines carrying low vapour pressure products. Terasen submitted that it is confident that the notch toughness of the Category I pipe to be used on the Project would equal or exceed that of Category II pipe.

Views of Parties

PCA submitted that, if Terasen could provide assurance that the Category I pipe met the notch toughness requirements for Category II pipe in CSA Z662-03, the use of Category I pipe would be sufficient to meet PCA's goal of providing the highest level of protection for the Park.

During argument Terasen stated that, for the segment of the pipe which extends through JNP, the pipe would be tested for notch toughness requirements to meet the minimum standards of Category II as per CSA Z662-03 and that a letter of compliance would be supplied to Parks Canada confirming this result.

2.1.3 New Pump Stations and Pump Station Upgrades

In addition to the pipeline loop, Terasen proposed the construction of two new electric drive pump stations. The Wolf Pump Station would be located approximately 25 km east of the town of Edson, Alberta at KP 188. The Chappel Pump Station would be located 35 km north of Blue River, BC at KP 555.5. Electricity for the two new pump stations would be provided by the provincial grids in Alberta and BC through facilities to be constructed by a third party and with approvals from the relevant provincial regulators.

Terasen stated that modifications would be required at two existing pump stations: the Jasper Pump Station and the Hinton Pump Station. The locations of the pump stations are shown in Figure 2-1. The two existing pump stations would require yard piping and tie-in modifications to accommodate the Project. The Jasper Pump Station would require installation of a check valve, tee assemblies and an inlet and a discharge pipe. The Hinton Pump Station, which would be constructed as part of the TMPSE Project, would be modified to facilitate the installation of the upstream 30-inch pipeline loop segment, the downstream 36-inch pipeline loop, and associated scraper trap components.

2.1.4 Deactivation of Mainline and Pump Station

Terasen submitted that the Project would necessitate the deactivation of 158 km of the existing 610 mm (24-inch) pipeline between KP 310.1 and KP 468.0 and the temporary suspension from service of the Niton Pump Station, until such time as market conditions would support the need for additional capacity. The pipeline segment to be deactivated would be purged with nitrogen and held at a slight positive pressure. All operational checks and routine maintenance would continue as usual for the deactivated pipeline (i.e., aerial patrol, monitoring nitrogen pressure, cathodic protection readings and survey, etc.).

Terasen submitted that the Niton Pump Station would be put into temporary suspension of operation and would be fully isolated from the Trans Mountain system. The station piping would be purged with nitrogen and held at a slight positive pressure. As with the Trans Mountain pipeline, all operational checks and routine maintenance would continue as usual for the Niton Pump Station to maintain the integrity of the station for future potential use.

Terasen indicated that, once the Project is in service, an application for deactivation of both the 610 mm (24-inch) pipeline and the Niton Pump Station would be filed with the Board pursuant to Section 44 of the *Onshore Pipeline Regulations, 1999* (OPR-99).

Views of the Board

The Board notes that Terasen's design of the Project would meet the requirements for pipe wall thickness under CSA Z662-03. In particular, the Board notes that Terasen has committed to using heavy walled pipe at road crossings, railway crossings, major stream crossings, areas of increased MOP, and locations where accommodation is being made for future highway twinning.

The Board is of the view that the proposed wall thicknesses for the pipeline have been selected appropriately and have taken into consideration the environment in which the Project is situated. The Board notes Terasen's commitment that the final pipe specifications, including those for heavy wall pipe applications, would be filed with the Board upon completion of the detailed design.

The Board notes that, as per CSA Z662-03, pipelines carrying low vapour pressure products are required to meet Category I notch toughness requirements. The Board is of the view that the use of Category I pipe is adequate for the Project. In addition, the Board notes that, in response to a request from PCA, Terasen has exceeded the minimum requirements of CSA Z662-03 by committing to undertake additional measures to verify that the pipe used for the Project has comparable notch toughness to Category II pipe.

The Board also notes Terasen's commitment to apply under section 44 of the OPR-99 for the deactivation of the existing 610 mm (24-inch) pipeline and the Niton Pump Station following the Project going into service.

The Board finds that the design of the Project is appropriate and contains measures to provide additional protection to the environment with which the Project would interact.

2.2 Geotechnical Matters

In 1998, as part of its *Canadian Integrity Management Program*, Terasen developed a Natural Hazards Management Database (NHMD) which tracks the occurrence and details of the

numerous hydrotechnical and geotechnical hazards along the Trans Mountain system. Information from the NHMD was used to refine the Project route to avoid repeated or predictable environmental loads such as bank scour and terrain instability to the greatest extent possible. Terasen undertook additional studies and committed to develop specialized designs by qualified engineers for geotechnical concerns, areas of rock excavation by blasting, and larger watercourse crossings.

Terasen provided a geotechnical report that described a number of physiographic elements including surficial bedrock, terrain instabilities, debris flow creeks, watercourse scour, extensive wetlands, avalanche tracks, highly erosive soils and flood prone areas within the study area which influenced the route and design.

2.2.1 Terrain Stability

Terasen's geotechnical report noted a number of ground instabilities and mass wasting features including historical rockslides, avalanches and slumps encroached upon by the Project. Based on recommendations made in the report, Terasen undertook a supplemental investigation to confirm if any of the observed instabilities pose design or integrity concerns for the Project. Terasen submitted that the supplemental investigation found no major geotechnical concerns or constraints along the Project route.

Terasen committed to manage common geotechnical concerns including slope stability and surficial erosion, using shallow angles on cut slopes, early revegetation, surficial erosion and drainage controls. Terasen also noted that it would continue to monitor and track terrain instabilities as per *Terasen Pipeline's Geotechnical Hazard Management Program*, which includes regular aerial patrols. Terasen indicated that it would undertake additional inspections of potentially unstable slopes during the spring and summer following construction. In addition, as part of Terasen's *Canadian Integrity Management Program*, regular aerial patrols of the pipeline RoW would be performed to monitor for visible threats to pipeline integrity including natural hazards. Aerial patrols of the Trans Mountain system, including the Project, would be performed every two weeks during summer months and monthly during the winter with patrol frequency varying based on weather conditions.

2.2.2 Watercourse Scour

Terasen undertook a preliminary field review of all watercourses during Project planning to assess crossing locations. The geotechnical report identified several creeks along the project route which exhibited debris flow characteristics.

For major crossings and locations where operational records and field inspections indicated flood events or channel scour could be significant, Terasen collected available watershed and flow data for use in developing crossing designs. Terasen selected a 1:200 year flood event as the design criteria for watercourse crossings to protect the pipeline against damage from watercourse scour or debris impact. Terasen submitted that it would develop site specific designs for major watercourse crossings based on river surveys, comparative air photo analysis, and scour/bank erosion analysis. For smaller watercourse crossings, Terasen has specified a minimum pipe burial of 1.5 m based on professional judgment.

Views of the Board

The Board notes that Terasen has operated the Trans Mountain pipeline in this region for over 50 years in a safe and reliable manner. The Board also notes that the proposed project corridor traverses an area where natural hazards are present, including high gradient watercourses and mass wasting events such as avalanches, debris flows and landslides. The Board is of the view that Terasen has adequately identified risks to pipeline integrity related to natural hazards and has developed reasonable mitigative measures. The Board notes the evidence that patrol frequency would vary based on weather conditions and therefore expects that Terasen would increase the frequency of its monitoring and inspection of slopes and watercourse crossings during times when natural hazards are most prevalent.

2.3 Integrity

Terasen submitted that its *Canadian Integrity Management Program* makes use of historical experience and current pipeline inspection and maintenance practices to identify and address potential hazards to ensure the safe and reliable operation of the Trans Mountain pipeline system. Terasen has committed to fully integrate the Project into its *Canadian Integrity Management Program* prior to operation. Terasen confirmed that both Terasen and its new owner Kinder Morgan Canada Inc. are committed to the ongoing execution of its *Canadian Integrity Management Program*.

As part of Terasen's application to the NEB, several elements of Terasen's *Integrity Management Program* were examined by the Board as follows.

2.3.1 Leak Prevention and Detection Systems

2.3.1.1 Leak Prevention

Terasen's program for leak prevention on its existing Trans Mountain system includes designing, constructing, and maintaining facilities to ensure that facilities are fit for their intended purposes, installing pressure regulating facilities to limit operating pressures to a safe range, implementing its *Canadian Integrity Management Program*; and using a cathodic protection program.

Terasen stated that, following construction of the Project, the Trans Mountain system would continue to be controlled and operated from the existing Primary Control Centre (PCC) located in Edmonton, Alberta. The PCC uses two computer-based systems: Supervisory Control and Data Acquisition (SCADA), and Computation Pipeline Monitor (CPM), to monitor and control the Trans Mountain system. These computer-based systems would be used to provide an early warning system for leaks.

2.3.1.2 Valves

Terasen proposed that the Project would include the installation of 20 Mainline Block Valves (MLBVs), 13 of which would be new remotely operated gate valves, seven new check valves, and one existing remotely operated gate valve. The valve locations were determined using four requirements: code requirements (protection of major rivers, reduction of draindown volumes due to terrain); protection of environmentally sensitive areas; pipeline facility requirements; and sectionalization of the pipeline for operations reasons.

2.3.1.3 Draindown Analysis

A draindown analysis was conducted by Terasen to determine the average valve spacing and the location of valves along the Project. The draindown analysis examined the potential for oil spills along the route in the worst case scenario of a full circumferential break of the pipeline and examined various valve spacing options that could be used in order to limit the potential oil volumes that would be lost. Terasen determined through the analysis that the average spacing of the valves would be best suited at approximately every eight kilometres. This would result in an average draindown volume of 923 m^3 and a peak draindown volume of 3 350 m^3. Terasen stated that the typical valve spacing for other large diameter oil pipelines range from eight to 45 km with draindown volumes ranging between 5 000 to 8 000 m^3. Accordingly, Terasen concluded that the valve spacing selected and the draindown volumes are conservative when compared with other large diameter oil pipelines and regulatory requirements for major developed nations.

2.3.1.4 Leak Detection Sensitivity

Terasen's leak detection system is based on the integration of SCADA and CPM systems as well as its *Canadian Integrity Management Program*. The CPM system is a computer-based mathematical model of the pipeline that combines a detailed description of the pipeline with real time data collected by the SCADA system. It is used to monitor pipeline hydraulics to detect abnormal pressure conditions in order to detect possible leaks. The SCADA system collects real time data including pressure, temperature, and flow measurements. The data is collected by instrumentation installed along the pipeline system and the SCADA system validates the measurements against predefined limits.

On average, the CPM has the capability of detecting leaks of 100 m^3/h or larger within 10 minutes. Larger leaks would be detected even more quickly by SCADA system alarms that would alert operators to abnormal pressures and flow rates on the pipeline. During annual testing of the Trans Mountain pipeline, Terasen noted that the current CPM system successfully detected simulated 70 m^3/h leaks in fluid withdrawal tests. Upon completion of the Project, Terasen expects detection thresholds to be the same or better than the current levels.

To maintain or improve current detection levels, Terasen would be undertaking the following installations as part of the Project:

- pressure and temperature transmitters on the suction and discharge side of each of the two new pump stations at Wolf and Chappel;
- pressure and temperature transmitters at the new remote block valve sites; and

- a new custody transfer quality flow meter at Rearguard, BC in addition to the one that would be installed in Edmonton, Alberta as part of the TMPSE Project.

CPM leak detection would only be one of a number of leak detection methods employed on the proposed Project. Additional methods that would be employed include:

- helicopter patrols;
- instrumentation at Terasen's facilities that sets off an alarm due to abnormal pressures and flows, and storage and sump tank levels;
- operations personnel performing on-going surveillance of facilities;
- third party reporting, enhanced public awareness program, and signage at strategic locations;
- Control Centre Operators continually monitoring the pipeline using SCADA; and
- a review of total pipeline inventory eight times per day and monthly reviews.

2.3.2 In-line Inspection

Terasen committed to conducting a post-construction deformation inspection using a caliper tool following the hydrostatic pressure testing of the pipeline and prior to the operation of the Project. The caliper tool would be used to determine if there are any anomalous deformations in the pipe prior to the pipeline being put into operation. If any anomalous deformations in the pipe are detected, Terasen would excavate those locations for inspection and would make all necessary repairs, as required by CSA Z662-03.

Additionally, Terasen would be conducting a "metal-loss" in-line inspection tool run within approximately five years of the Project going into service to be followed by subsequent in-line inspections at intervals of five to ten years to ensure the continued integrity of the pipeline.

Letters of Comment

Letters of comment received from Ms. Joan Kehr and the BC Tap Water Alliance expressed concerns with respect to pipeline integrity and the ability to provide adequate environmental protection. The concerns expressed included the type of valves, the selected valve spacing, the number of valves selected along the Project, and the frequency of in-line inspections.

Views of the Board

The Board uses a lifecycle approach to evaluate the integrity of facilities. In addition to considering integrity through the application process, the Board also evaluates a company's integrity management system through inspections during construction and operations and audits to ensure the company is taking all appropriate measures to ensure the integrity of pipeline facilities that have been approved by the Board. Accordingly, should the Project be granted approval, the Board would continue to use

its inspection and audit functions to provide ongoing regulatory oversight of Terasen's *Canadian Integrity Management Program* for the Project.

The Board is mindful of the unique environmental setting of the Project located within JNP and MRPP. While the Board notes the concerns expressed in the two letters of comment, the Board is satisfied that Terasen has adequately addressed the potential integrity issues associated with the Project and further is of the view the proposed in-line inspections, valve types and valve spacing selected for the Project are appropriate.

2.4 Safety of Design and Operation

Terasen submitted that the Project would be designed, constructed, operated, and abandoned in accordance with the OPR-99, CSA Z662-03, and all other applicable standards, specifications, and codes referenced in Terasen's application. Terasen further submitted that the Project would be designed, constructed, and operated in accordance with Terasen's internal standards and practices.

The Project may encounter conditions that are not specifically addressed in sufficient detail by CSA Z662-03. In this event, Terasen stated that it would have qualified engineers develop certified detailed engineering designs that would meet the intentions of CSA Z662-03.

Views of the Board

The Board is satisfied that the Project would meet widely accepted standards for design, construction, operation, and abandonment, including OPR-99 and CSA Z662-03 as well as Terasen's internal standards and practices. However, given that Terasen's internal standards and practices will be updated for the Project, the Board would require a condition in any approval granted requiring Terasen to submit, prior to construction, the applicable Project-specific internal standards and practices. The Board is also satisfied that, in the event project conditions arise that are not specifically addressed by CSA Z662-03, Terasen would develop designs that would meet the intentions of CSA Z662-03 and that these designs would be submitted to the Board pursuant to section 8 of the OPR-99.

To help ensure the continued safe operation of the existing and expanded Trans Mountain system, the Board would require a condition, in any approval granted, directing Terasen to submit an updated *Emergency Preparedness and Response Plan* prior to the Project going into operation.

2.5 Construction of the Facilities

Terasen indicated that it would employ conventional construction practices where applicable, but given the constraints of the Project's RoW, specialized construction techniques would be employed in instances where typical procedures are not feasible, for example in narrow or confined RoW. Terasen submitted that the specialized construction methods, along with typical

construction methods, would ensure that construction of the Project is conducted in a safe, economic, and efficient manner. Terasen committed to ensuring that these specialized construction methods are included as part of its Project-specific *Construction Safety Manual* for the Project.

Terasen submitted that welding would be in compliance with OPR-99 and CSA Z662-03. Additionally, where the Project ties into the existing mainline at KP 468, Terasen submitted that metallurgical tests would be conducted to determine if the mainline has a carbon equivalent content between 0.50 and 0.52 percent. Carbon equivalent content can increase the hardness of materials and decrease the ability to successful weld the materials. If the existing pipe at the tie-in location has a carbon equivalent content between 0.50 and 0.52 percent, Terasen committed to submitting to the Board its tie-in weld procedures, related specifications and, following their completion, the results of procedure qualification tests.

Terasen proposed two potential construction schedules, a baseline and an advanced schedule, for the construction of the Project. The baseline construction schedule was developed on the basis that Board approval would be received no later than February 2007, while the advanced construction schedule was developed on the basis that Board approval would be received no later than 15 December 2006. Under the baseline schedule, construction of the Project would begin in mid-2007, with the completion of construction in the third quarter of 2008. Terasen argued that, if the advanced schedule were employed, the Project could potentially have an in-service date six months in advance of the baseline schedule allowing for critically needed transportation capacity to become available sooner.

2.5.1 Blasting

The geotechnical report identified numerous areas of surficial bedrock along the Project route and anticipated the use of explosives for rock excavation within areas of JNP. Where practical, Terasen would be using mechanical excavation equipment to remove bedrock deposits instead of blasting. Terasen committed to develop and submit to the Board blasting protocols specific to the Project that incorporate practices to preserve worker and public safety, the natural environment and adjacent infrastructure. Terasen indicated that the Project's blasting protocols would be developed by a blasting engineering specialist in consultation with Fisheries and Oceans Canada (DFO), PCA, BC MOE and owners of adjacent utilities and infrastructure.

Terasen identified locations where blasting would occur in close proximity to inhabited structures, transportation corridors and infrastructure and developed mitigation measures to provide safety during blasting operations in those areas. Terasen committed to the use of blasting mats to control fly rock in the vicinity of inhabited structures. Terasen also stated that it would deem wildlife concerns an appropriate consideration in determining the use of blasting mats.

2.5.2 Watercourse Crossings

Based on a balance between technical feasibility, environmental impact and cost, Terasen identified conventional isolation crossing techniques as the preferred method for pipeline installation at the majority of watercourse crossings. Terasen noted that, while open cut

crossings have the highest probability of technical success, they also have the potential to result in habitat alteration and sediment yield.

Where conventional isolation techniques were not achievable, Terasen submitted that trenchless methods, including aerial crossings, horizontal directional drilling (HDD), and bores were considered. The use of aerial crossings was eliminated from further consideration due to long-term safety and technical concerns and the lack of acceptance by most stakeholders. Terasen noted that the use of punch bores was limited only to small diameter pipelines and that the use of punch bores was deemed to be acceptable only for one crossing location where the sensitivity of fish habitat was deemed to warrant disturbance to the areas adjacent to the crossing.

Terasen submitted that the success of HDD is dependent on the composition of the substrate, and that a high confidence level based on geotechnical evaluation is needed to warrant undertaking an HDD. Terasen conducted several iterations of review, data collection and assessment to determine locations where HDD pipeline installations would be appropriate. In the first iteration, Terasen assessed various crossing methods that could be used for watercourse crossings. In that assessment, it was identified that, given the 914 mm (36-inch) diameter of the pipeline, a drill path of at least 350 m would be necessary to facilitate a HDD, and therefore, a HDD would only be appropriate at large river crossings. As a result, Terasen considered the use of HDD for the crossings of nine large rivers.

The second iteration involved conducting preliminary geotechnical surveys and assessment and resulted in the identification of six sites where HDD may be technically feasible. These sites included:

- Athabasca River at KP 337
- Snaring River at KP 360
- Miette River at KP 383
- Miette River at KP 396
- Moose River at KP 433
- Fraser River at KP 458

A third iteration involving further geotechnical surveys and assessment resulted in a conclusion that three of the six river crossings, the Athabasca, the Miette at KP 383 and the Fraser, were not technically suitable for the successful use of HDD. The remaining three river crossings were deemed to be technically feasible, but not justified due to uncertainty of continuous HDD favorable sediments, drilling costs and risk. A fourth iteration was conducted involving a change to the HDD configuration at Miette KP 396 that resulted in Terasen deciding to attempt an HDD at this location.

Terasen submitted that a justification for non-HDD crossings at each of the fish-bearing watercourses would be included in the fish habitat compensation plan to be filed with the Board. During the hearing, Terasen stated that it would continue to inform applicable regulatory agencies of any design changes and that a compensation program for the Moose and Snaring rivers has been prepared, which Terasen described as being amenable.

Views of the Board

The Board is satisfied that Terasen will develop and implement appropriate construction methods to handle challenges faced during construction in light of the constraints of the Project's RoW. The Board notes Terasen's commitment to incorporate the specialized construction methods into its *Construction Safety Manual*.

Should approval be granted, the Board would require a condition directing Terasen to submit its field joining program and tie-in weld procedures prior to joining, and its *Construction Safety Manual* prior to construction.

The Board notes that Terasen has committed to develop comprehensive Project-specific blasting protocols using expert personnel and in consultation with potentially affected parties. Should an approval be granted, the Board would require a condition for Terasen to file, prior to construction, a copy of its Project-specific blasting protocols.

The Board notes Terasen's commitment to safety, and environmental protection including wildlife concerns during blasting activities. In this connection, the Board would require a condition, in any approval granted, directing Terasen to use blasting mats, in addition to the other design controls, to contain fly rock in order to provide an additional level of protection for the environment during all blasting operations within JNP and MRPP.

The Board is satisfied with the detailed analysis that Terasen carried out to aid in its determination of the proposed watercourse crossing designs. The Board further notes Terasen's commitment to consult with applicable regulatory agencies regarding its proposed methods for river crossings.

2.6 Exemption from the Leave to Open Provisions of the NEB Act

In its application Terasen requested an exemption from the requirements of Sections 30, 31, and 47 of the NEB Act. Terasen subsequently clarified the relief it was seeking and requested any further or other related relief as the Board may deem just and proper pursuant to section 20 of the NEB Act.

Views of the Board

Given the nature of the Project, the surrounding environment, the consequences of any inadvertent release of oil or products, and the Board's regard for safety and pipeline integrity, should an approval be granted, the Board would direct Terasen to file separately, and at a later date, an application under section 47 of the NEB Act for leave to open for the Project. In addition, should an approval be granted, the Board would require a condition requiring Terasen to submit its field pressure testing program prior to pressure testing.

Chapter 3

Consultation

3.1 Public Consultation Program

Terasen stated that the public consultation program for the Project was designed to meet the special ecological and cultural characteristics of the Project area and the unique characteristics of stakeholders having potential interests in JNP and MRPP.

Terasen identified federal, provincial and local government departments and agencies, Aboriginal groups, local communities, landowners, residents, trappers and environmental non-government organizations (ENGOs) as having an interest in the Project and focused its consultation program on these groups.[1]

Terasen submitted that, starting in the spring of 2004, various methods were used to provide project information to these stakeholders including meetings, newspaper notices, letters, e-mail, telephone calls and open houses in: Hinton, Alberta; Jasper, Alberta; Simpcw / North Thompson Indian Reserve, BC; and Valemount, BC.

Terasen submitted that a consultation program with parties interested in environmental matters was initiated in the spring of 2004 which also included four, two-day Environmental Issues Consultation Meetings held in Calgary and Jasper, Alberta between December 2004 and January 2006. Terasen indicated that over 20 ENGOs, Aboriginal groups and government representatives participated in the meetings.[2] The spectrum of those consulted can be seen by the following sample:

- Fraser Headwaters Alliance;
- Parks Canada;
- Simpcw / North Thompson First Nation;
- Metis Regional Council, Metis Nation Zone IV;
- Canadian Parks and Wilderness Society;
- BC Ministry of Water, Land & Air Protection;
- Aseniwuche Winewak Nation of Canada; and
- Nakcowinewak Nation of Canada.

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1 In addition to the public consultation process, Aboriginal groups were invited to participate in Terasen's Aboriginal Engagement Program, outlined in section 3.2.

2 A list of those organizations invited to the Environmental Issues Consultation Meetings is provided in Appendix IV.

Other organizations that were invited but that did not attend the meetings included, for instance:

- Friends of Jasper Park;
- Sierra Legal Defence Fund;
- Sierra Club of Canada;
- Chetwynd Environmental Society; and
- The Pembina Institute for Appropriate Development.

Terasen advised that, to facilitate the involvement of organizations and individuals in these meetings, it reimbursed participants' costs for travel and accommodation.

Terasen stated that Project design or scope changes were made in response to concerns raised and feedback received through public consultation and included:

- route refinement to minimize stream and wetland crossings;
- species added to wildlife studies;
- a commitment to provide financial support to participants concerned about environmental effects to retain independent technical experts for the purpose of reviewing the environmental assessment documents; and
- the establishment of a Net Benefit initiative and multi-stakeholder group to identify opportunities to enhance the ecological integrity of the MRPP and JNP in conjunction with the Project.

Terasen submitted that it would continue to work with individuals and groups to identify and address environmental issues and concerns with the objective of resolving these issues and concerns in a manner that meets the interests of all parties.

At the hearing Terasen argued that, given the large number of environmental groups, First Nations and others who participated in Terasen's public consultation process, the lack of public opposition and the lack of interventions in the NEB's oral hearing demonstrated the success of Terasen's public consultation process.

Views of the Board

When considering the consultation undertaken for a project, the Board expects that the design of a consultation program be appropriate for the nature of that project. In the case of this Project, the Board is mindful of and has regard for the unique characteristics of the Project setting, specifically that the Project traverses lands claimed as the traditional territories of Aboriginal peoples, as well as the Canadian Rocky Mountain

Parks, JNP and MRPP, that combined are a designated UNESCO World Heritage Site.[3]

The Board is of the view that Terasen's consultation program was exemplary and clearly met the Board's expectations with respect to determining the appropriate level of public involvement for a given project. Terasen established a level of public involvement appropriate to the specific scope and setting of the Project.[4] Terasen was inclusive in identifying potentially interested stakeholders, began consultation nearly two years prior to filing its application with the NEB and used information gathered through the consultation process to inform the design of the Project. In addition, Terasen employed both consultation and joint planning techniques in its public involvement program. The Board notes Terasen's commitment to continue to work with individuals and groups in order to meet the interests of all parties and would expect that Terasen's consultation efforts continue throughout the lifecycle of the pipeline and facilities.

3.2 Aboriginal Engagement Program

As part of its public consultation program, Terasen identified several Aboriginal groups for engagement purposes. Terasen submitted that, in identifying which Aboriginal groups to engage, it considered whether the Aboriginal community or group had historical sites and traditional lands that may be directly impacted by RoW clearing, pipeline construction or ongoing maintenance, possessed an interest in the lands that would be directly impacted by the proposed RoW, or who self-declared their desire to be engaged. Starting in the spring of 2004, Aboriginal groups were contacted to determine their level of interest in engagement and in participating in Terasen's Project discussions.

At Terasen's first Environmental Issues Consultation Meeting in December 2004 Aboriginal consultation was raised as an issue. Terasen was advised by participants that, given that Aboriginal interests are defined by legal and constitutional rights, Aboriginal communities are unique and therefore these communities require a separate consultation process. Terasen was informed that the affected aboriginal communities' interests within MRPP and JNP are land-based and that there was an interest in having a Memorandum of Understanding (MOU) with Terasen to assist in defining roles and responsibilities. At that meeting Terasen committed to engage Aboriginal communities through a separate process, and agreed that these communities would have a unique consultation process.

Terasen stated that, as a result of comments received during the consultation process, it developed an Aboriginal Engagement Program (AEP) for the Project. Terasen suggested that Aboriginal groups would be interested in ensuring that issues of concern to them would be

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3 The Canadian Rocky Mountain Parks World Heritage Site is comprised of the contiguous national parks of Banff, Jasper, Kootenay and Yoho, as well as the Mount Robson, Mount Assiniboine and Hamber provincial parks. (source: http://whc.unesco.org/pg.cfm?cid=31&id_site=304)

4 This approach is consistent with the guidance in the NEB Filing Manual, Chapter 3, Section 3.3 Consultation.

appropriately addressed and that these issues were expected to be environmental matters, as well as issues specific to Aboriginal culture and economic aspirations. Terasen's AEP was developed to be sufficiently flexible to respond to new information gathered during consultation and to address specific needs or requests.

Terasen noted that its AEP was founded on several phases of relationship building, continuous communication and open meetings with Aboriginal communities. Terasen submitted that its focus on establishing and developing partnerships with the Aboriginal communities resulted in mutually beneficial outcomes such as the signing of an MOU with SFN in August 2005, a communications agreement with Aseniwuche Winewak Nation, community open houses, economic development agreements, the involvement of Aboriginal Elders in the environmental studies and traditional land and resource study (TLRUS) and various community investment opportunities. In addition, Terasen also noted that it had provided a Capacity Building Funding Support Agreement for the SFN to review and was waiting for a response to the proposed agreement.

Terasen also noted that it would continue to work with Aboriginal communities to address concerns and identify mutually beneficial opportunities.

Views of Parties

In argument, as an indication of the SFN's concerns about Terasen's consultation process, the SFN referred to the November 2005 TLRUS that Terasen submitted with its application. The TLRUS included statements from two Aboriginal groups about the limitations of the TLRUS with respect to consultation. In the TLRUS both the Nakcowinewak Nation of Canada and the SFN suggested that Terasen consult with other members of their respective First Nations as they may have additional knowledge about the Project area.

The SFN argued that Aboriginal groups raised concerns about negative cultural and environmental effects that could be caused by the Project that were identified within the TLRUS. An assessment of these effects, including effects on burial sites, wetlands, rivers, cultural and archaeological sites, visual landscapes, native vegetation, as well as proposed mitigation is set out in the ESR for the Project.

The SFN filed the *2006 Simpcw Consultation and Accommodation Guidelines*, including the *Simpcw Cultural Heritage Policy*, the *Simpcw Referrals Processing System*, and the Map of the Simpcw Traditional Territory. The *Simpcw Consultation and Accommodation Guidelines* were written by the Simpcw Band Council in 2006 to define for the Crown and Third Parties the expectations of the Simpcw in relation to proposed activities by the Crown or Third Parties within Simpcwul'ecw territory and to define the SFN's expectations regarding the obligations of the Crown and Third Parties.

The SFN also raised the issue of consultation in its 3 August 2006 Notice of Motion. The Board issued its decision on the SFN Motion by letter dated 24 August 2006, which is reproduced in its entirety in Appendix II of these Reasons for Decision.

Views of the Board

With respect to Terasen's consultation with Aboriginal groups the Board is of the view that Terasen was inclusive in identifying potentially interested Aboriginal peoples. The Board notes that, as a result of feedback received during the public consultation process, Terasen developed a parallel Aboriginal Engagement Program. The Board also notes that representatives of the SFN and the Nakcowinewak Nation of Canada recommended that Terasen continue to involve members of their respective First Nations who possess traditional knowledge of the Project area. The Board is mindful of Terasen's commitment to continue to work with these First Nations and expects that Terasen would continue to consult with other affected Aboriginal groups in the Project's development and throughout the lifecycle of the pipeline and facilities.

Chapter 4

Involvement by the SFN in the NEB Regulatory Process and in the CEA Act Process

This chapter sets out the opportunities afforded to parties to participate in the Board's regulatory process, the opportunities to participate in the CEA Act process and how the SFN participated within each of those processes.

As outlined in the previous chapter, the applicant began contacting Aboriginal peoples, including the SFN, in the spring of 2004. In the months following, the SFN participated in Terasen's Environmental Issues Consultation Meetings and the separate Aboriginal engagement process arranged by Terasen.

On two occasions, Terasen invited parties who participated in its Environmental Issues Consultation Meetings to comment on the Terms of Reference leading up to the scope of the Project and the CEA Act process[5]. When the SFN did not comment on the Terms of Reference by the initial deadline of 15 July 2005, Terasen extended the deadline to 25 July 2005. However, the SFN did not provide comments. When Terasen sent a final copy of the Terms of Reference to the CEA Agency, Terasen also invited the SFN to comment or raise its concerns directly to the CEA Agency. There was no evidence to show that the SFN made comments regarding those Terms of Reference.

On 10 February 2006, the NEB sent a letter to Terasen setting out the Board's expectations for the evidence to be included in the Application with respect to Terasen's contacts with Aboriginal people who might be affected by the Project. Terasen included this information in its application and later responded to Information Requests from the Board where the Board noted SFN concerns raised in Terasen's TLRUS.

The Application was received on 17 February 2006 and was set down for hearing on 19 April 2006. Interventions were due on 10 May 2006. After the Board's deadline of noon, 10 May 2006, the SFN filed an application for intervenor status in the NEB proceeding. No application for relief to accept the late intervention was provided by the SFN. Acting on its own motion, the Board determined that no party would be prejudiced and decided to grant the SFN intervenor status.

Prior to the commencement of the hearing, on 31 May 2006, the NEB issued for comment the Preliminary ESR to all RAs. All parties to the OH-1-2006 proceeding received a copy of the Preliminary ESR, including the SFN.

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5 As part of the definition of environmental effects, traditional land and resource use by First Nations must be taken into consideration when assessing a project. In addition to setting out requirements of RAs other than the Board, the Terms of Reference is based on Board's *Filing Manual*, which sets out the Board's expectations for environmental assessment including consideration of traditional land and resource use by Aboriginal people.

On 30 June 2006, the SFN filed its written evidence four days after the 26 June 2006 deadline for filing written evidence. No relief for the filing of late evidence was applied for. Again acting on its own motion, the NEB accepted the SFN's late submission of evidence. The evidence submitted consisted of the SFN's Consultation and Accommodation Guidelines dated 2006, including the Simpcw Cultural Heritage Policy, the Simpcw Referrals Processing System and a map of the SFN's claimed traditional territory.

By letter dated 31 July 2006, the SFN filed a letter with the Board and sent copies to all other RAs for the Project. In that letter, the SFN set out their objection to the environmental assessment process set by the RAs. The SFN stated that no offers of resources for assistance to advise the SFN of their rights and interests regarding the Project had been made from any of the RAs. The SFN requested an immediate end to all environmental assessment proceedings and undertakings and that an environmental assessment be recommenced as a Panel Review. Further, the SFN requested that the Crown commence actively fulfilling its duties related to the honour of the Crown and its fiduciary duties and to engage in informed and resourced consultation and accommodation.

Shortly thereafter, on 3 August 2006, the SFN filed a Notice of Motion with the Board requesting that the Board delay its hearing process by six months to allow the SFN to present information that, in the SFN's view, the Board needed to make its regulatory decision.

At the start of the hearing on 8 August 2006, the Board heard nearly two days of argument on the SFN's Motion and CEAA Process Complaint Letter and issued its ruling by letter dated 24 August 2006.

Aside from arguing on the Motion and CEAA Process Complaint Letter, the SFN also participated in the NEB's oral public hearing from 8 to 10 August 2006 on Terasen's Application. The SFN cross-examined Terasen's witnesses. They presented direct testimony by Chief Matthew upon which he was cross-examined by the Applicant. During cross-examination, the Chief indicated he had no more evidence to file and nothing more to add at that time. The SFN also presented final argument.

On 17 August 2006, the NEB issued an Interim Draft ESR for comment by the RAs. All parties to the proceedings, including the SFN, were sent notification of the release of that document and were invited, along with RAs, to comment on it by no later than 8 September 2006.

On 5 September 2006, the SFN wrote to the Board to inform the Board that the SFN had not been given a copy of the Interim Draft ESR, to ask the Board what the Board's policy is on Aboriginal consultation and accommodation and to invite the Board to meet with the SFN on 19 September 2006. On 12 September 2006, the Board responded to the SFN by setting out that the SFN had been sent notification of the release of the Interim Draft ESR, in accordance with the SFN's stated ability in its intervention to access the Board's repository and to thus receive such notification. The Board also noted that the SFN would have a further opportunity to comment on the screening after the Board's release of a Draft ESR, scheduled for 18 September 2006. In response to the SFN's query on the Board's Aboriginal consultation policy, the Board attached a copy of its document entitled "*Consideration of Aboriginal Concerns in National Energy Board Decisions*", which contains information the Board requires of applicants where a

project may impact Aboriginal people. In response to the SFN's request for a meeting on 19 September 2006, the Board indicated that, as a quasi-judicial tribunal, the Board could not engage on one-on-one discussions with any party outside of the hearing process and thus could not attend the meeting. The Board did indicate, however, that it would take into consideration any submissions by the SFN during the regulatory proceeding and any comments made by the SFN on the Draft ESR.

On 8 September 2006, the SFN sent further correspondence to the Board and other RAs that included background information regarding the SFN's claimed Aboriginal rights and title in preparation for the 19 September 2006 meeting with RAs. By letter dated 26 September 2006, the Board reiterated that as a quasi-judicial tribunal it was unable to meet with the SFN on 19 September 2006. The Board further stated that the evidentiary and argument phases of the hearing had concluded and as such, the SFN letter of 8 September would not be admitted into evidence. The Board further reminded the SFN that all that remained to be submitted were the comments on the Draft ESR which was released for comment on 18 September 2006.

On 18 September 2006, the NEB issued for comment the Draft ESR to all RAs and all parties to the OH-1-2006 proceeding. In issuing the Draft ESR, the Board informed RAs and all parties that the deadline for comments was 2 October 2006.

By letter dated 29 September 2006 to the Board, the SFN summarized some of the outcomes of the 19 September 2006 meeting with the RAs and indicated that it needed additional time to conduct its own studies and to prepare a document for RAs setting out the scope of the new studies, the scope of work, additional timeframes and a budget. The SFN indicated that it would provide a document setting out the scope of the new studies, the scope of work, additional timeframes and a budget to the RAs by 4 October 2006. The Board extended the deadline for the SFN to file comments to 4 October 2006.

On 13 October 2006, counsel for SFN copied the Board on two further letters, one of which contained comments on the content of the Draft ESR and historical information on Simpcw rights and title in the Project area. In its letter, the SFN summarized its claims with respect to rights and title in the Project area and expressed the view that there were some deficiencies in the Draft ESR. The SFN specifically commented on the number of stream crossings identified, the compensation ratio for wetlands, the need for the Simpcw to be involved in the Heritage Resources monitoring, response and mitigation plan, and cited concerns with the cumulative effects assessment.

On 17 October 2006, the Board provided Terasen with the opportunity to comment on whether the 13 October 2006 letter to the RAs should be admitted to the record and treated as comments on the DESR and what, if any, comments Terasen had on the SFN's 13 October 2006 letter, should the Board decide to take the SFN's letter into consideration. After taking the representations of the Applicant into account, the Board decided to admit the late comments by the SFN on the DESR.

Views of the Board

Under the NEB regulatory process, an applicant is required to initiate early contact with individuals and communities that may be affected by the proposed project. This early public notification process is designed to provide those potentially affected by the project to have early discussions with the proponent about their concerns and to enable to proponent to explain the project and perhaps make modifications to it as appropriate. With respect to Aboriginal communities and groups, the applicant is required to meet early on with those potentially affected, to document their concerns and address those concerns to the degree possible prior to the filing of the application. As part of the Board's filing requirements, an applicant must include information about its discussions with Aboriginal peoples and an environmental assessment, where required, is prepared. A thorough assessment of the environmental and socio-economic effects of the project on Aboriginal peoples must be included.

As set out in the previous chapter of these Reasons, the Board is satisfied that Terasen met the evidentiary threshold in its application and that its pre-application efforts in this regard were thorough. The Board notes that, on at least two occasions, participants to Terasen's Environmental Issues Consultation Meetings, including the SFN, were invited to comment on the Terms of Reference leading up to the CEA Act process. When the SFN did not comment on the Terms of Reference by the initial deadline of 15 July 2005, Terasen extended the deadline to 25 July 2005. However, the SFN did not provide comments. The Board also notes that a final copy of the Terms of Reference was sent to the SFN and that the SFN had another opportunity to comment or raise its concerns directly to the CEA Agency. There was no evidence to show that comments were made or received.

Once an application is filed with the Board, all interested parties, including Aboriginal peoples, have the opportunity to participate in the Board's process and to make their views known to the Board before it renders a decision. As well, the Board can on its own initiative solicit additional information from parties. In this case, the Board notes that in accordance with its standard practice, it asked information requests of Terasen about known Aboriginal issues and also about ongoing consultations and any new concerns that may have arisen since the application was filed. Terasen provided responses that addressed the known concerns and indicated that no new concerns had arisen.

The Board is a quasi-judicial regulatory body and therefore, its process must be public, open and adhere to the principles of natural justice. It is not open to the Board to have off-line private meetings with interested parties. Therefore, Aboriginal groups who raise concerns about a project must make their representations in the context of the public hearing. The

public hearing process is designed to provide a full and fair opportunity for all parties, including Aboriginal peoples, to make their views known to the Board. The SFN had full opportunity to participate in that process and did so.

Following the conclusion of the oral portion of the hearing, all parties were provided with another opportunity to comment on both the Interim Draft ESR and the Draft ESR. Other than citing concerns and asking for additional time to comment, the SFN did not provide any substantive comments on the Draft ESR until 13 October 2006, eight days past the deadline for comments. The Board took these considerations into account prior to making its determination under the CEA Act. However, there was nothing in the representations of the SFN that led the Board to conclude that a determination could not be made under the CEA Act.

The Board notes that it is only one decision-maker and that there are other regulatory decisions to be made in respect of this Project. Specifically, DFO, Transport Canada and PCA have decisions to make and may need to carry out further discussions with the SFN and the Applicant. There is also continual monitoring during the construction phases of any pipeline project to ensure that effects are minimized and conditions are adhered to by the Applicant. The SFN will therefore have further opportunities throughout all phases of the Project to ensure that its interests are protected.

The Board is therefore satisfied that the SFN had full opportunity to participate in its process. To the extent the SFN elected to provide its views to the Board, those views were fully taken into account in both the CEA Act determination and the decision under the NEB Act. Should the Project be approved, the Board will impose conditions that are designed to ensure that there are no significant adverse effects on Aboriginal groups in the Project area.

The Board is satisfied that its process in this case was fair to all parties including the SFN.

Chapter 5

Routing and Land Matters

5.1 Route Selection

Terasen submitted that its route identification and route selection process involved special effort to address the added sensitivity of its location within both a national and a provincial park. The route selection process involved extensive consultation with JNP and MRPP staff, representatives of other federal, provincial and municipal departments, ENGOs, Aboriginal communities, landowners and other stakeholders in the Project areas and the public.

At the conclusion of the route identification and selection process two routes were selected for complete environmental and technical assessment: the Existing Route; and the Proposed Route. The Existing Route would be contiguous with the existing Trans Mountain pipeline for its entire length. The Proposed Route, for which Terasen applied for approval, would be contiguous with the existing Trans Mountain pipeline for 56 percent of its length and would be on, or abut, other existing linear rights-of-way for 43 percent of its length. The remaining one percent of the proposed route represents connections from one existing RoW to another.

Terasen submitted that the Proposed Route follows the existing Trans Mountain pipeline RoW to the maximum extent practical, deviating from the existing pipeline route only where necessary to reduce environmental and social effects, or to address technical or safety issues. Terasen submitted that two of the key considerations reinforced by stakeholders in its route selection process were to avoid wetlands through which the existing Trans Mountain pipeline is routed and to avoid, or substantially reduce, multiple crossings of major watercourses. As a result, the Proposed Route would have 20 percent fewer waterbody crossings, cross 27 fewer fish-bearing waterbodies, and traverse nearly 30 percent less wetland area than the Existing Route. Terasen concluded that the Proposed Route was superior to the Existing Route with respect to environmental and social considerations, pipeline integrity, health and safety, constructability, and operations and maintenance.

Terasen submitted two modifications to the Proposed Route: the first location is within the Jasper Town Site; and the second is at KP 396 to KP 400 to address concerns raised by PCA to installing the pipeline within a historic rail bed. Terasen indicated that, while it prefers the Proposed Route, the alternative of using the existing Trans Mountain RoW was also feasible. Terasen submitted that a final routing option for these two locations would be chosen pending the outcome of discussions with the appropriate government parties.

Views of the Board

The Board notes that Terasen has taken into account the considerations raised by stakeholders during consultation in its route selection process.

The Board is satisfied with Terasen route selection process. The Board finds that the proposed general route of the pipeline to be acceptable.

With respect to the route modifications for the Jasper Town Site and KP 396 to KP 400, the Board notes that approval of the general route would be sufficient to encompass these proposed route modifications. The final routing at these two locations would be determined through the discussions between Terasen and the PCA. The Board notes that the outcome of those discussions would be reflected in Terasen's plans, profiles and book of reference (PPBoRs) to be filed with the Board for approval.

5.2 Land and Land Rights

The lands traversed by the Project include provincial Crown lands in Alberta and BC, including MRPP; and federal Crown lands being JNP. At the western end of the Project, there are four private parcels of lands.

The types of land rights required by Terasen for the construction, operation and maintenance of the Project include new permanent easement, temporary work space, extra work space, and fee simple purchase. For the JNP and MRPP, a form of land tenure or suitable arrangement would be made taking into account the unique features of these parks.

5.2.1 Pump Station and Scraper Trap Facilities

The Project would include the installation of two new pump stations and two new scraper trap facilities. The new pump stations Wolf at KP 188.0 in Alberta and Chappel at KP 555.5 in BC would be situated on a cleared area of land approximately 100 m x 100 m (1 ha). Excess lands would be left undisturbed around each pump station as a buffer.

The land required for the Wolf Pump Station would be acquired from a private landowner with whom Terasen has indicated it has executed an Option to Purchase. The Chappel Pump Station would be located on previously cleared BC provincial Crown lands and land rights would be acquired through a license, or a form as prescribed by the applicable agency.

The new scraper trap facilities would be located at the Hinton Pump Station (KP 317.7) and at Hargreaves (KP 468.0). The Hinton scraper trap would be situated on lands currently owned by Terasen. The land required for the Hargreaves scraper trap would be situated on a site of approximately 1 hectare (ha).

5.2.2 Pipeline Loop Right-of-Way

The width of the existing Trans Mountain easement in JNP and MRPP is 6.1 m and 18.0 m, respectively. Outside the parks the existing easement is 18.0 metres wide. During construction, the normal width of the pipeline construction RoW (including permanent easement and temporary work space) would be between 25 and 35 metres.

The Proposed Route traverses Crown lands, except near the western end of the loop section where the route traverses four private parcels. Terasen proposes to use its existing RoW for the majority of the Proposed Route. In JNP and MRPP additional land rights are required from CN Railway. Acquisition for land rights within the provincial and federal Crown lands would be done through the necessary pipeline lease agreement. In most cases, the applicable agency would provide the form of agreement.

5.2.3 Temporary Work Spaces

Terasen would require extra work space to accommodate construction at specific locations, such as major roads, railways or larger rivers. Further ancillary sites would be required on a temporary basis for construction purposes including the staging and stockpiling of equipment and materials.

5.3 Land Acquisition Process

Terasen indicated that most land acquisition activities would occur after June 2006. However, Terasen noted that some applications to the Crown had already been made and negotiations were underway.

Where negotiations have commenced, Terasen preceded these discussions with service of a notice under section 87(1) of the NEB Act. Individual ownership plans would be prepared for all lands required for the Project. Terasen indicated that, when landowners are served their Section 87(1) Notice, they would also be provided with a copy of the NEB publication, *Pipeline Regulation in Canada: A Guide for Landowners and the Public*. Terasen anticipates acquiring all necessary land rights in advance of construction activities, typically within eight weeks prior to the planned construction date.

5.3.1 Crown Lands

Terasen intends to apply to the appropriate Crown agency for the necessary authorizations, permits and/or agreements.

For those parts of the Project within MRPP, Terasen would obtain permission pursuant to the BC Parks Act, which would entail a process to amend the boundaries of MRPP.

5.3.2 Private Lands

For the Wolf Pump Station Terasen has executed an Option to Purchase and would follow with a purchase in fee simple. For the four private parcels, Terasen noted that it would follow the land acquisition process in accordance with the NEB Act.

5.3.3 Land Acquisition Agreements

In its application, Terasen submitted copies of its land acquisition agreements as well as its form of Section 87(1) Notice. Terasen did not provide copies of the form of agreement with the Crown, since those documents are provided to the company by the Crown.

Views of the Board

The Board finds that Terasen's anticipated requirements for permanent and temporary land rights are reasonable. The land rights documentation and proposed acquisition process by Terasen are also acceptable to the Board.

Chapter 6

Environment and Socio-Economic Matters

6.1 Environmental Screening Process

The Project would require a Certificate of Public Convenience and Necessity under section 52 of the NEB Act, and thus triggers the requirement for an environmental screening under the CEA Act. Since the Project does not require more than 75 km of new RoW, the Project required a screening level of environmental assessment under the CEA Act, as opposed to a comprehensive study[6].

To reduce potential duplication in the environmental assessment process, the Board, other responsible authorities and the provincial departments with an environmental assessment responsibility worked together to create a coordinated screening process that would meet the needs of each in their environmental assessments.

To facilitate the input of other RAs and government departments with an environmental assessment responsibility, the Board issued a Preliminary ESR on 31 May 2006. The Board received input on the Preliminary ESR from the PCA, Environment Canada, Transport Canada, and the BC MOE. Following the oral portion of the proceeding, an Interim Draft ESR was made available to RAs, government departments and parties for their comment. The Interim Draft ESR was amended by the Board to include the comments provided and a Draft ESR was released to the public for comment. The final ESR incorporates the input received as a result of these three rounds of comments and provides the views of the Board and the Board's determination under the CEA Act.

The ESR describes the Project, the setting for the Project, the methodology for the assessment, the potential environmental and socio-economic effects, mitigation measures, and evaluates the likely significance of any adverse environmental and socio-economic effects.

The proposed Project has the potential to adversely affect several components of the environment, as detailed in the ESR, which was issued with the Board's CEA Act determination on 19 October 2006. The main potential environmental effects related to this Project include:

- loss or diminishment of ecological integrity in Jasper National Park;
- disruption of wetland functions;
- various disturbances to wildlife, wildlife habitat and vegetation;
- effects on species at risk and of special concern;

6 CEA Act Comprehensive Study List Regulations, Schedule (Section 3), Part IV, subsection 14, (a) indicates that a comprehensive study level of environmental assessment is required for "an oil and gas pipeline more than 75 km in length on a new right of way."

- alteration of aquatic ecosystems (both fish bearing and non-fish-bearing), and disturbance to fish and fish habitat;
- spreading of forest health pathogens and non-native and invasive (weed) species;
- alteration of soils and physical environment (including unique dune environments);
- potential for introducing new contaminants, or reintroducing past spilled contaminants, to soil and water;
- alteration of visual and auditory disturbances; and
- potential effects on archaeological/heritage resources, traditional land and resource use, and human occupancy and resource use.

The Board determined in the ESR that, with the implementation of Terasen's environmental protection procedures and mitigation measures and the Board's recommendations, the proposed Project is not likely to cause significant adverse environmental effects.

Copies of the ESR are available in the National Energy Board library or on-line at https://www.neb-one.gc.ca/ll-eng/livelink.exe?func=ll&objId=399196&objAction=browse&sort=-name.

6.2 Socio-Economic Matters

A number of socio-economic matters come within the purview of the CEA Act and were assessed in detail within the ESR. Other socio-economic matters fall within the purview of the NEB Act and are discussed below.

6.2.1 Employment and Economy

Terasen submitted that the Project would have a positive residual effect on employment and economy as follows:

- construction expenditure for the Project is expected to total $399.4 million; $135.6 million to be spent in BC and $191.8 million in Alberta and $72.0 million elsewhere;
- the Project is estimated to generate $612.0 million of outputs; $245.7 million in BC and $366.3 million in Alberta;
- construction of the Project would generate $240.8 million in GDP; $88.8 million in BC and $152.0 million in Alberta;
- the equivalent of 3,486 person-years of employment would be generated by construction of the Project; 1,730 person-years in BC and 1,756 person-years in Alberta;
- construction of the Project is estimated to generate $187.6 million in labour income, $72.5 million in BC and $115.1 in Alberta;
- construction of the Project is estimated to generate $32.3 million in federal tax revenues, $9.6 million in BC and $22.7 million in Alberta;
- construction of the Project is estimated to generate $22.6 million in provincial tax revenue, $10.6 million in BC and $12.0 million in Alberta; and

- construction of the Project is estimated to generate $3.9 million in municipal tax revenues, $1.3 million in BC and $2.5 million in Alberta.

In 2005, Terasen paid approximately $18.2 million in property taxes to municipal governments in BC and $2.1 million to municipal governments in Alberta. With construction of the Project, Terasen estimated that its property taxes would increase by $1.5 million in BC and $0.3 million in Alberta. However, should the existing 610 mm (24-inch) pipeline be deactivated, Terasen noted that its property taxes in BC would drop to $0.5 million over 2005 levels.

After completion of construction, operation of the Project is estimated to generate three full-time-equivalent person-years of employment annually: two for operation of the pipeline and one for operation of the pumping stations.

Letter of Comment

The burdens on local economies due to the intensity of oil sands development were highlighted in a letter of comment from Ms. Joan Kehr. The letter claimed that the Project would contribute to the intensity of development in the area and identified examples of problems that could be exacerbated by the Project such as shortages of skilled labour, lack of accommodation, escalating cost of living, and an economic bust that would follow an economic boom.

6.2.2 Infrastructure and Services

Terasen indicated that local communities, including Hinton, Edson, Jasper, Valemount and others would be able to supply emergency and community services that may be required throughout the lifecycle of the Project.

Terasen filed evidence to show that route refinements along the Proposed Route were made in order to accommodate the future planned expansion of Highway 16.

Terasen advised that access roads for construction would be prioritized as follows: existing access roads and trails; existing rights-of-way of others; reactivated former access trails; and new access routes identified and reviewed with PCA and BC MOE staff.

Terasen also indicated that some traffic control may be required. Terasen confirmed that a detailed plan for management of public traffic and management of construction traffic access to public roads would be developed in consultation with the agencies that have responsibility for traffic management and road access.

Views of the Board

The Board acknowledges the concerns expressed by Ms. Kehr and recognizes that there are burdens and benefits associated with the development of the facilities it regulates. In this case, the Board accepts Terasen's evidence, summarized in the Employment and Economy section above, that the Project would result in positive effects including, but not

limited to, economic benefits from construction expenditure and tax revenues, and direct and spin-off employment benefits.

The Board accepts Terasen's evidence with respect to infrastructure and services. The Board notes that Terasen has made modifications to the Project based on feedback from other government departments. The Board notes Terasen's commitment to develop a detailed traffic management plan in consultation with the appropriate agencies and would expect to see the final plan in Terasen's Environmental Protection Plan which would be submitted to the Board for approval prior to commencement of construction.

The Board notes that Terasen has worked with several government departments on matters of infrastructure and services related to the Project and expects that Terasen will continue to do so.

Chapter 7

Economics, Finance, Supply and Markets

7.1 Economic Feasibility

Terasen submitted that the economic feasibility of the Project is demonstrated by shipper support, the level of apportionment on the Trans Mountain system, and the market forces discussed in the Energy Analysts International Report (EAI Report).

Terasen indicated that the Project has broad shipper support in the form of a MOU signed with the Canadian Association of Petroleum Producers (CAPP) on behalf of shippers on the Trans Mountain system. Terasen noted that it had signed an MOU with CAPP on 22 December 2005 for a new Incentive Toll Settlement (ITS) that contained provisions for the recovery in tolls of capital, operating and financing costs over the next five years for both the TMPSE Project and the applied-for Project.

Terasen submitted that, for the past three years, the Trans Mountain system has experienced significant levels of apportionment. Terasen indicated that apportionment is expected to continue until more capacity is achieved through the TMPSE Project and the commissioning of the applied-for Project in 2008.

Terasen noted that apportionment of pipeline capacity, in light of growing supply and increased market demand, has resulted in significant uncertainty for shippers on the Trans Mountain system and lost opportunities for producers. Terasen concluded that the significant level of apportionment was demonstrative of the need to expand the Trans Mountain system.

Terasen indicated that, once the incremental capacity from the Project becomes available in 2008, the Trans Mountain system is expected to continue to operate at capacity. However, construction of the Project would enable the additional expansion of the Trans Mountain system outside of JNP and MRPP to meet future incremental transportation requirements, particularly from increased oil sands production.

To meet requirements for additional transportation capacity, Terasen noted that it had considered both pipeline and non-pipeline alternatives as a substitute for a pipeline loop. These alternatives included:

- non-pipeline transportation (truck and rail transportation);
- additional pump stations in JNP and MRPP;
- no action; and
- alternate routing.

After an examination of the alternatives, Terasen considered the alternatives to be inadequate and concluded that the Project represents the most efficient method to expand the capacity of the Trans Mountain system.

Terasen retained Energy Analysts International (EAI) to provide pricing, netback, supply and market analysis to assess the need for the Project. Terasen submitted that the EAI Report supports the economic justification for the Project and suggests that the incremental capacity would be fully utilized as soon as it is available due to strong levels of supply and demand.

7.2 Financial Matters

Terasen indicated that the Project would be financed by a combination of new long-term debt, short-term credit facilities and equity capital. The capital raised would be approximately proportional to the existing capital structure: 55 percent debt and 45 percent equity; while debt would be approximately 80 percent long-term and 20 percent short- term.

Terasen indicated that the equity component of the Project would be funded by a combination of retained earnings and equity contributions from Terasen Inc. The debt portion would be financed initially by a three or five-year bank credit facility, and on completion of the Project, the debt would be refinanced on a longer term basis in either the bank market or the capital market. Terasen submitted that existing short-term credit facilities would be adequate to satisfy short-term needs.

Terasen advised that it did not foresee any difficulty in accessing financial markets for acceptably priced debt as Terasen Inc. has approximately $5 billion in assets and Trans Mountain has no public debt. Further, with the financial underpinning of the proposed ITS for the years 2006 through 2010, the Company would have the financial ability to issue debt as required.

Terasen submitted that the MOU it had signed CAPP outlined the financial terms to be reflected in the ITS that Terasen expected to be completed and filed with the Board by mid-2006. Terasen noted that the ITS contained provisions for the recovering of both the TMPSE Project and the proposed Project's capital, operating and financing costs in tolls for the next five years. The MOU outlined the financial terms to be reflected in the ITS and included: capital structure consistent with the NEB multi-pipeline proceeding (RH-2-94); negotiated rates of return for both debt and equity; incremental operating expenses; depreciation expense; and a provision for income taxes.

Terasen indicated that, if the filing of the ITS was delayed beyond July 2006, and if CAPP consents, it would apply to file the MOU with the Board in confidence under section 16.1 of the NEB Act. With the consent of CAPP, by letter dated 27 July 2006, Terasen applied to the Board to file the MOU in confidence stating that the MOU is a confidential commercial and financial document that has consistently been treated as confidential by the signatories. By letter dated 4 August 2006, the Board advised Terasen that it was of the view that the MOU should be treated confidentially, pursuant to section 16.1 of the NEB Act.

No parties sought to examine Terasen on the issue of financing or the proposed ITS, and no parties requested to see the MOU.

7.3 Supply

According to the EAI Report, total production in the Western Canada Sedimentary Basin (WCSB) is forecast to increase from 353 100 m^3/d (2,221,000 b/d) in 2004 to 580 000 m^3/d (3,648,000 b/d) by 2010. The forecast for the WCSB includes rapid expansion of bitumen and synthetic crude oil production and continued decline in conventional crude oil production.

In developing its forecast, EAI analyzed field level production data for conventional crude oil and a combination of publicly available reserve estimates and announced or active project development plans to estimate future bitumen supply to produce an overall crude oil supply outlook.

7.4 Markets

Terasen submitted that the Trans Mountain system provides Canadian producers with access to growing markets on the west coast as well as Asian markets. Terasen noted Trans Mountain system has direct pipeline access to four refineries in the Puget Sound area with a total crude oil tower capacity of 101 700 m^3/d (633,000 b/d). Terasen further noted that, via connections with US pipelines and its tanker loading facility at Westridge BC, the Trans Mountain system has access to nineteen refineries in Washington, Oregon, Hawaii, Alaska and California that have a total capacity of approximately 334 400 m^3/d (2,103,000 b/d).

The EAI Report identified a number of fundamentals that are driving the west coast market. These include:

- increasing supply of western Canadian crude oil with limited market outlets, particularly for heavy crude oil;
- growing demand for heavy crude oil in California to replace declining production levels;
- potential growing demand in the Washington State market to replace declining ANS production and the displacement of foreign off-shore crude oil supplies;
- an increase in the capabilities of Washington area refineries to process more Canadian crude oil;
- potential for increased consumption of Canadian crude oil in Asian markets; and,
- strong growth in the BC market for finished products.

According to the EAI Report, the total crude replacement requirement for the California market is forecast to increase by 45 000 m^3/d (283,000 b/d) in 2010 and by 74 000 m^3/d (465,000 b/d) by 2015. This market, coupled with the Washington, Asia and U.S. Gulf Coast markets, represents a viable and growing market for Canadian light and heavy products. The Washington and U.S. Gulf Coast markets represent expansions in markets that already process significant volumes of Canadian crude oil. California and Asia are markets that occasionally process spot volumes of Canadian crude oil and represent extensions beyond western Canada's traditional markets.

EAI Report noted that the California market is of particular interest to Canadian producers because Californian refineries are some of the most complex in the world and have the capability to process heavy, sour, high TAN crudes (Total Acid Number higher than 0.5). This is important to producers of Canadian heavy crude oil, bitumen and synbit blends.

Terasen noted that a number of supply, pricing and market developments have occurred since the date the EAI report was produced and that the overall impact of these changes was a greater increase in requirements for crude oil imports in the U.S. West Coast markets.

Views of the Parties

CAPP

CAPP argued that the evidence supporting the conclusion that the Project is in the public interest is substantial and uncontroverted. CAPP stated that there is a great need and economic desirability for the Project. It noted that there is a growth of supply in Western Canada that needs additional pipeline capacity, above and beyond the capacity currently proposed by Terasen. CAPP further argued that the economic benefits to Canada of connecting growing supply to markets are huge and that the economic consequences of trapped supply are simply unacceptable. CAPP noted that all other pipelines are in expansion mode and that more capacity is needed as soon as it becomes available.

CAPP asserted that failure to proceed with the application would create a huge economic cost to both the country and producers who are the first to experience the effect of a lack of adequate pipeline capacity. CAPP noted that, for several years, apportionment has already been the cause of problems on the Trans Mountain system.

CAPP argued that the long-term economic viability of the Project is supported by the strong supply and demand outlook for oil. It noted that the Project has the full support of industry and that cost recovery and the roll-in of costs on a common carriage pipeline is in accordance with the MOU that was signed by CAPP on behalf of industry. With respect to the support of industry, CAPP noted that, in response to the motion by the SFN that threatened to delay the hearing, individual companies were quick to react and appear in front of the Board to make clear the importance of the Project, not only to industry as a whole, but to each of them as individual producers.

Producers

ConocoPhillips Canada Limited (ConocoPhillips), Imperial Oil Resources Limited (Imperial), Nexen Inc. (Nexen), and Shell Canada Limited (Shell) expressed their support in argument for the approval of the TMX – Anchor Loop Project. ConocoPhillips and Shell noted that they had experienced apportionment that had restricted their ability to access markets. All of the producers argued that there is an urgent need for timely and adequate pipeline capacity to accommodate the current and projected growth of crude oil supply from Western Canada.

Views of the Board

In arriving at its decisions, the Board has regard to the requirements of both legislation and its established regulatory framework. The Board's decisions are governed by the requirements of the NEB Act which, under section 52, lists economic feasibility as one the factors that the Board may consider in determining whether proposed pipeline facilities are required by the present and future public convenience and necessity.

The Board has traditionally determined the economic feasibility of pipeline facilities by having regard to evidence on all relevant factors which impact the likelihood that the applied-for facilities will be used at a reasonable level over their economic life and that the associated demand charges, or tolls, will be paid. Evidence on economic feasibility includes information on supply, transportation, markets and financing, as described in detail in the Board's Filing Manual.

To obtain economically efficient outcomes there must be adequate transportation capacity to connect supply to markets. The Board notes that the Trans Mountain system has experienced significant levels of apportionment over the past three years and is mindful of the effects that a shortage of pipeline capacity can have on Canadian producers and marketers, and the markets that they serve.

The Board is aware that Terasen Pipelines has successfully operated the Trans Mountain system within the context of multi-year incentive tolling agreements. In this connection, the Board notes the MOU that Terasen has signed with CAPP and accepts this as evidence that the Project has the support of shippers on the Trans Mountain system. The Board also notes the support expressed by individual producers during the proceeding and the fact that no party to the proceeding questioned, or took issue with the need to provide adequate pipeline capacity.

With respect to financial matters, the Board notes that Terasen has the ability to finance the Project and the existence of a signed MOU with CAPP, which underpins the proposed facilities, is evidence that adequate provisions exist for the recovery of capital, operating and financing costs for the applied-for facilities.

The Board notes the evidence Terasen submitted in its application that western Canadian crude oil production has grown significantly and will continue to grow due to the development of the oil sands. The Board also notes the evidence of declining crude oil production in Alaska and California and that growing demand in BC, Washington State, California and Asia represent market opportunities for Canadian producers and marketers. The Board notes that Terasen's evidence on supply and markets was not challenged by any other party to the proceeding.

Having regard to the evidence, the Board is satisfied that the applied-for facilities will be used at a reasonable level and that the associated demand charges, or tolls, will be paid.

Chapter 8

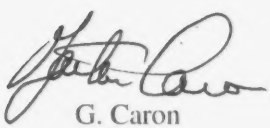
Disposition

The foregoing constitutes our Reasons for Decision in respect of the application considered by the Board in the OH-1-2006 proceeding. The Board is satisfied from the evidence that the TMX – Anchor Loop Project facilities are, and will be, required by the present and future public convenience and necessity.

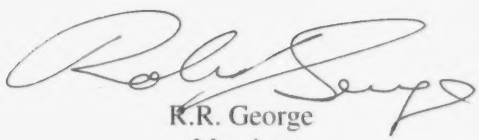
Having denied Terasen's request for exemption from section 47 of the Act, the Board directs that Terasen shall apply separately for leave to open pursuant to section 47 of the Act.

Having made its determination under the CEA Act, the Board approves Terasen's application pursuant to section 52 of the Act and will recommend to the Governor in Council that a certificate be issued, subject to the certificate conditions set out in Appendix III.

J.S. Bulger
Presiding Member



G. Caron
Member



R.R. George
Member

Calgary, Alberta
October 2006

Appendix I

List of Issues

1. The need for the proposed facilities.

2. The appropriateness of the design of the proposed facilities.

3. The safety of the design and operation of the proposed facilities.

4. The potential environmental and socio-economic effects of the proposed facilities, including those factors outlined in subsection 16(1) of the *Canadian Environmental Assessment Act*.

5. The appropriateness of the route selection and general land requirements.

6. The terms and conditions to be included in any approval the Board may issue.

Appendix II

NEB Ruling on the Motion by the SFN

National Energy Board

Office national de l'énergie

File A-FP-PA-TTM 2006 1 (3200-T099-2)
24 August 2006

To: All Parties to OH-1-2006

Re: **Hearing Order OH-1-2006 – Ruling No. 1**
Board decision on the Motion filed by Simpcw First Nation and CEAA process complaint letter

Background

On 17 February 2006, Terasen Pipelines (Trans Mountain) Inc. (Terasen) filed an application with the National Energy Board (NEB or Board) under section 52 of the *National Energy Board Act* (*NEB Act*) for a certificate of public convenience and necessity for the TMX-Anchor Loop Project (the Project). Intended to alleviate capacity constraints and increase the ability of Canadian producers and marketers to access West Coast markets, the Project would consist of a pipeline loop and associated facilities and would extend from Hinton, Alberta to a location near Rearguard, British Columbia. The Project would essentially follow the existing Trans Mountain right-of-way through Jasper National Park and Mount Robson Provincial Park.

On 19 April 2006, the Board issued Hearing Order OH-1-2006 in respect of the application, setting out the timelines and procedure to be followed leading up to the oral hearing of the application. Specific to intervenors, the Board set out 10 May 2006 as the deadline for intervention. The deadline for information requests by intervenors to the Applicant was 30 May 2006. The deadline for intervenors to file their evidence was 26 June 2006. The oral portion of the hearing was scheduled for and proceeded, as scheduled, on 8 August 2006.

The Project is subject to an environmental assessment under the *Canadian Environmental Assessment Act* (CEAA). Based on a project description filed by Terasen in April 2005, the Board and other Responsible Authorities each determined that the Project was subject to a Screening under that Act. Terasen, having sought comments from interested groups, and in consultation with Responsible Authorities other than the Board, submitted the Terms of Reference for the Screening to the Canadian Environmental Assessment Agency on 10 November 2005. Concurrent to the timelines set out in the Hearing Order, the Board also included timelines for comments by Responsible Authorities and the public on the Screening.

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Letter of Complaint on CEAA Process

On 31 July 2006, the Simpcw First Nation (SFN) filed a letter with the Board and sent copies to all other Responsible Authorities for the Project. In that letter, the SFN set out their objection to the environmental assessment process set by the Responsible Authorities. The SFN set out that no offers of resources for assistance to advise the SFN of their rights and interests regarding the Project had been made from any of the Responsible Authorities.

The SFN specifically objected to:

a) the decision to proceed by way of Screening as opposed to a Comprehensive Study or Panel Review;
b) the decision to set the scope for the environmental assessment; and
c) the decision to set the Terms of Reference for the environmental assessment.

The SFN set out that the Project would pass through land subject to the SFN's claim of aboriginal rights and title. As a result of the asserted rights and title and the proposed activity related to the Project, the SFN stated that there are proposed work and activities in respect of:

a) fish, fish habitat and potential fish habitat;
b) significant activities that will severely affect the environment in a National Park, including the potential removal or damage of SFN traditional uses and structures within that Park;
c) the requirement of an electrical transmission line for the Project;
d) a gas pipeline, including a line of more than 75 km in length; and
e) significant impact on the existing aboriginal rights and title affected by all of the above.

To that end, the SFN requested an immediate end to all environmental assessment proceedings and undertakings and that an environmental assessment be re-commenced as a Panel Review. Further, the SFN required that the Crown commence actively fulfilling its duties related to the honour of the Crown and its fiduciary duties and to engage in informed and resourced consultation and accommodation. The SFN requested that the Responsible Authorities attend at the SFN Nation, in Chu-chua, British Columbia on 14 August 2006 to discuss the proper and more expanded environmental assessment that, in the SFN's view, must take place for the Project.

On 3 August 2006 the Board issued a letter to all parties to OH-1-2006 stating that it would hear from all parties on this CEAA process complaint at the start of the OH-1-2006 Hearing, on 8 August 2006.

Notice of Motion

On 3 August 2006, the SFN filed a Notice of Motion with the Board and served copies on all parties to OH-1-2006. The Motion sought:

a) an order from the Board to re-open and extend the deadlines set out in Hearing Order OH-1-2006 by six months to allow the SFN to:
   i. make information requests to Kinder Morgan Canada Inc.; and
   ii. make information requests of other parties;
b) leave to collect and file written evidence;
c) leave to cross-examine the other parties;
d) a decision by the Board to convene a hearing at the Simpcw First Nation to allow SFN to call its own witnesses and to cross-examine the witnesses of the other parties who will have already appeared before the Board; and
e) an order from the Board that it will not grant any regulatory approvals under the *NEB Act* or the *CEAA* until the SFN has concluded its submissions to the NEB and had an opportunity to cross-examine the other parties.

In its Notice of Motion, the SFN cited sections 18, 19, and 20 of the *NEB Act* and subsection 4(1) of the *National Energy Board Rules of Practice and Procedure, 1995* as grounds for the Motion. As background to the Motion, the SFN set out that the hearing could not proceed because:

1. a Joint Working Agreement, contemplated in a Memorandum of Understanding, had not been signed between the SFN and Terasen prior to Terasen filing its application with the Board;
2. the SFN had been faced with unreasonable opposition by Terasen in the SFN's attempts to protect its aboriginal rights and title in Jasper National Park by participating in studies in the Park;
3. the scope of environmental assessment was insufficient because no government department offered the SFN resources to advocate for a comprehensive study or a panel review and as such, a Screening would not be appropriate; and
4. the SFN lacked the capacity and funding to carry out environmental impact and traditional use studies or to even retain legal counsel.

On 4 August 2006, the Board sent a letter to all parties stating that it would hear the Motion at the beginning of the OH-1-2006 Hearing on 8 August 2006.

Views of Parties

Simpcw First Nation

In oral argument, counsel for the SFN focused on procedural fairness as the basis for the Motion. Relying on the Supreme Court of Canada case *Baker* v. *Canada (Minister of Immigration)*,[1] counsel raised the issue of procedural fairness with respect to a Memorandum of Understanding (MOU) between Terasen and the SFN and the SFN's ability to fully participate in the environmental assessment process instituted by the Applicant and by regulatory authorities.

Counsel argued that an MOU signed in August 2005 between Terasen and the SFN contemplated the signing of a Joint Working Agreement by December 2005 which, as at the date of hearing the Motion, had not been concluded. According to counsel, the SFN need more time to work further with Terasen in order to conclude a Joint Working Agreement. Counsel cited the *Baker* case for the proposition that where one party creates, for others, the legitimate expectation that it will follow a course of action, then another party has the right to expect that course of action to indeed be followed. In other words, the MOU contemplated that a Joint Working Agreement be concluded by a certain date which has come and gone. This agreement has not yet been signed, and the SFN have a legitimate expectation that it will be so, but the parties need time in order to conclude that agreement.

Furthermore, the SFN's Consultation and Accommodation Guidelines for the Crown and third parties[2] has not been met and until it is, the hearing should not proceed. Counsel noted that, should the Joint Working Agreement be signed prior to the six month hearing extension deadline, the need for the extension may be eliminated and the Joint Working Agreement may accommodate the SFN's concerns.

Counsel set out that the second ground for the six month extension lies in the SFN's need for full participation in environmental assessment processes instituted by Terasen and the regulatory authorities. The SFN have not been able to fully participate. Counsel stated that, regarding the environmental assessment process established by the regulatory authorities, the SFN objected to the level of assessment and are of the view that they had not been adequately funded to participate in determining that level of assessment and nor did they have capacity to do so. Furthermore, according to counsel, the Terms of Reference agreed to by the regulatory authorities, except for the Board, only make minimal reference to First Nations at page 20.

Given the lack of capacity and scant reference in the Terms of Reference, the SFN would have wanted to fully appreciate what they were being asked to comment on when the Terms of Reference were being circulated for consideration. It is only now that the SFN have been able to retain counsel that they have been informed of their rights.

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[1] *Baker* v. *Canada (Minister of Immigration)*, [1999] S.C.J. 39.

[2] Filed by the SFN as the evidence in the proceeding and marked as exhibit C-5-2. Also attached to the Notice of Motion marked as exhibit C-5-5. Titled "Simpcw First Nation Consultation and Accommodation Guidelines 2006"

It was also argued by counsel that the environmental assessment process set out by Terasen does not reflect the SFN's traditional land and resource use. He submitted that the Parks Canada Agency has only just stated that it is willing to talk with the SFN about access to Jasper National Park and, the SFN will need time to collect and present their evidence to the Board with respect to the traditional land and resource use claimed in the Park. Counsel submitted that the SFN are in the best position to determine their traditional land and resource use and they were not given enough opportunity to do so.

Counsel directed the Board to the *Mikisew*[3] and *Haida*[4] cases for the proposition that, where a strong *prima facie* case of Aboriginal rights and title has been established, a First Nation must be consulted. In the case before the Board, according to counsel, the SFN do have a strong *prima facie* case of Aboriginal rights and titles and, must be consulted. In sum, there needs to be reconciliation between the SFN, Terasen and the Crown and to achieve this, the SFN need time to articulate their concerns and submit studies for the Board's consideration. Again, counsel noted that if the Joint Working Agreement is signed within the six month extension the SFN's issues may disappear.

Terasen

Counsel for Terasen asked that the Board, in considering the Motion, keep in mind what the SFN are asking for and weigh that against what the SFN have already received. Counsel outlined chronology, dating back to September 2004, with respect to five elements of the application process in which the SFN participated: environmental data collection; development of the Terms of Reference; the MOU; development of the Traditional Land Use Study; and Terasen's environmental assessment process.

With respect to the collection of environmental data, counsel outlined that nine qualified SFN members participated fully in field assessment teams collecting fisheries, wildlife, vegetation and archaeological data. Counsel invited parties to cross-examine Terasen's environmental panel on this participation. The SFN members were qualified for the work they performed and they were paid. One SFN member is a qualified archaeologist and participated in the Traditional Land Use Study. These SFN members were, at Terasen's request, retained by Terasen's environmental consultants on a contract basis and paid for their services and reimbursed for their expenses.

Counsel set out the chronology of he termed the SFN participation and approval of the Traditional Land Use Study, which is intended to allow a First Nation to identify their interests in land and resources that could be affected by a project. Counsel submitted that the SFN, along with other Aboriginal groups, participated in the Traditional Land Use Study for the Project at Terasen's expense. In addition to being involved in preparation, all Aboriginal groups who participated were asked to provide comments on the study. Counsel set out that the Traditional Land Use Study was not submitted until the SFN had indicated that there were no concerns with the report being submitted to the Board.

[3] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 S.C.C. 69
[4] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 S.C.C. 73

Regarding the consultation process for the environmental assessment prepared by Terasen, counsel pointed the Board to Terasen's application and specifically, Volume one, Part IV of the environmental assessment dealing with public consultation and Aboriginal engagement. That document shows that a representative of the SFN attended each of the four environmental impact consultation meetings held by Terasen and for which Terasen paid all costs associated for each participant. Counsel argued that at those meetings, Terasen offered funding for third-party review of the environmental assessment and the SFN never sought that funding.

Furthermore, submitted counsel, a draft of the environmental assessment was circulated in June 2005 for comments and that, while the final draft was considered complete in November 2005, Terasen had indicated that it would accept and incorporate further comments until January 2006. No comments from the SFN were received.

Turning to the SFN's participation in the drafting of the Terms of Reference, which lead to the scope of the Project for environmental assessment, counsel for Terasen submitted that the document was circulated to the SFN for comments but that, when no comments were received, Terasen extended the deadline for comments by 10 days. The final Terms of Reference and a request that the SFN (and others) review the environmental assessment was e-mailed to the SFN's band manager. Parties were advised to direct any further questions regarding the Terms of Reference to the Canadian Environmental Assessment Agency. A further e-mail was sent to the SFN enclosing the environmental assessment and a DVD of the application. Counsel set out that, in sum, the SFN participated in the Terms of Reference and had the opportunity to make their views known and to now say none of this matters because they have only just retained counsel is unfair in the extreme.

Specific to the SFN's participation in the Board's process, counsel set out that the Hearing Order was issued on 19 April 2006 and the SFN intervened. According to counsel, the SFN had the opportunity to ask information requests of Terasen by 30 May 2006. They also had the opportunity to file evidence by 30 June 2006 which they did. However, the evidence that the SFN filed in this hearing contained no hint of any concern with the issues now raised in their Motion or the CEAA process complaint letter. Had the SFN raised concerns then, parties and the Board could have asked information requests of the SFN to explore the issues.

In counsel's submission, the chronology demonstrated participation and sophistication on the part of the SFN.

Counsel then addressed the main issues that were outlined in the Notice of Motion. One of the allegations in the Notice set out that Terasen blocked the SFN's attempts to protect their Aboriginal rights and title in JNP. Tersasen's counsel pointed out that this argument was not even addressed by counsel for the SFN in oral argument. Furthermore, according to counsel, the chronology outlined demonstrates that Terasen and its consultants went to extremes to ensure the SFN's participation in archeological studies, for which the SFN were reasonably compensated.

With respect to the MOU, Terasen's counsel argued that the MOU outlines objectives, not obligations. One of those objectives is a Joint Working Agreement. Counsel submitted that Terasen would be willing to discuss the steps it has taken to live up to the MOU if the SFN agreed to remove any confidentiality under which discussions took place and Terasen proposals were made. Otherwise, in counsel's submission, the Board should view those submissions in the Notice of Motion as nothing more than unsubstantiated allegations.

Regardless, according to counsel, the MOU is irrelevant to the Board's decision because no agreement is needed in order for Terasen to consult with the SFN and to obtain the SFN's views or to ensure SFN participation leading up to the environmental assessment. Counsel for Terasen pointed out that the MOU pre-dates the SFN's Consultation and Accommodation Guidelines.

As for the SFN argument regarding funding and capacity, counsel submitted that the SFN have never taken that position up until their 31 July 2006 letter complaining about the CEAA process. According to counsel, the SFN professed to have a full understanding of the CEAA process as a result of involvement in CEAA-related projects in British Columbia and should not now be permitted to say that they are unfamiliar with the CEAA process and thus deserve special consideration because they lacked funding that had been put on the table and not accepted or because they lacked counsel that they have obviously obtained shortly before the Notice of Motion was filed.

As to the CEAA process complaint, counsel submitted that a Panel Review is still a possibility, as is Crown consultation. In Terasen's view, the project is not on the *Comprehensive Study List* and as such a Comprehensive Study is not needed. Even if it were, counsel asked, "what would it change?" All of the factors listed in section 16 of the CEAA appear in Terms of Reference even though they did not have to be included. Thus, even though the project is subject to a Screening, the level of review is a Comprehensive Study level of review.

As to the number of references to First Nations in the Terms of Reference, counsel argued that there are several references to First Nations in that document. Furthermore, CEAA defines an environmental effect to include the current use of lands and resources for traditional purposes by Aboriginal persons and the effects on physical and cultural heritage or on historical or archaeological issues and thus requires consideration of Aboriginal traditional land and resource use. Furthermore, according to counsel, the SFN participated in the Terms of Reference which preceded the decision to assess the Project by way of Screening and the scope of the factors. In short, argued counsel, the SFN had the opportunity to participate.

Last, counsel argued that the Board must balance the public interest which favours an expeditious addition of pipeline capacity with Aboriginal interests and that, in this instance, the balance lies with recognizing the active participation of the SFN today and the opportunities still available for participation and consultation.

Other Parties

In opposing the Motion, counsel for the Canadian Association of Petroleum Producers (CAPP) argued that the process has not failed the SFN. Counsel set out several examples of where the SFN were invited to participate. He pointed to the record, filed in the application, which demonstrates the SFN's contact with the Applicant as early as 22 months prior; to the Board's willingness to accept the SFN's late intervention and evidence; and to the SFN's stated capability of accessing the Board's electronic registry.

In CAPP's view, there will be no incentive for anyone to properly engage interested groups if, at last moment, someone could stop the Board's process. Counsel argued that there is established legal precedent that objections must be raised in a timely fashion and if a party participates in the process without raising an objection, then that party waives its right to object.

As for consultation, counsel stated that the *Mikisew*[5] case stands for the proposition that the Crown cannot treat First Nation's with indifference and that is not what we have here. Counsel cited the *Delgamuukw*[6] case, which clarifies the *Gladstone*[7] case to say that the limits placed on Aboriginal rights in order to further objectives that are sufficiently important to the broader community, such as infrastructure development, are a necessary part of the reconciliation of Aboriginal interests with the interests of the broader political society. In citing the *Haida*[8] case, counsel highlighted the spectrum available for consultation and accommodation and though, in counsel's submission, no *prima facie* case has been established by the SFN, procedural fairness in the NEB process and other processes is evident. Regardless, submitted counsel, Crown consultation is collateral to this process and will continue.

Counsel continued on to argue that both the *Haida*[9] case and the *Taku*[10] case set out that Aboriginal groups do not hold a veto right nor is there a need to reach agreement between the Crown and Aboriginal groups prior to the Crown proceeding. Furthermore, the Crown can incorporate into its own obligation other regulatory processes. In counsel's view, both the process under CEAA and NEB process meet the requirements in *Haida*[11] and in *Taku*,[12] where the process was upheld. Last, counsel noted that the SFN did not support with caselaw their argument that there is an obligation, either by the proponent or by the Crown, to provide funding or capacity.

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[5] *Supra* note 3.
[6] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.
[7] *R. v. Gladstone*, [1996] 2 S.C.R. 723.
[8] *Supra* note 4.
[9] *Ibid.*
[10] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 S.C.C. 74.
[11] *Supra* note 4.
[12] *Supra* note 10.

Counsel for the Parks Canada Agency characterized the issue raised by the Motion as one of procedural fairness. Counsel submitted that it is not appropriate or necessary to attempt to assess the SFN's asserted rights or the adequacy of Crown consultation in this process. Counsel argued that, on several occasions, Parks requested information to assess SFN's asserted rights in Jasper National Park and that no information has been forthcoming. In any event, according to counsel for Parks, Parks' position is that the SFN's rights that have been surrendered or otherwise extinguished prior to 1982. Regardless, regulatory decisions from the federal authorities have yet to occur and any existing consultation obligations would therefore continue outside of the Board's process. Counsel for Parks encouraged the Board to focus on what the Applicant has done and what the Board's process is in deciding upon the Motion.

As for the environmental assessment under CEAA, counsel for Parks argued that the CEAA process has been correctly followed as outlined in the letter dated 3 August 2006 from the Responsible Authorities. Essentially, section 18 of CEAA requires that a project not on the Comprehensive Study List Regulation must proceed by way of a Screening; this is not a discretionary decision and that, on an initial assessment of the facts, the Project did not fit within the Comprehensive Study List Regulation so a Screening is what was required. With respect to a Panel Review, that request is premature given that, under section 25 of CEAA, a Responsible Authority can request such a review in appropriate circumstances. In counsel's view, no extension in the Board's process is required.

The Board also heard argument from each of the following parties, all of whom were in opposition to the Motion: Chevron; ConocoPhillips; Imperial Oil; Nexen Inc.; and Shell Canada. These parties were either producers or refiners of oil and shippers on the TransMountain system. These parties argued that the process has been ongoing for quite some time and that no further delay is justified especially when considered against the need for oil pipeline capacity.

Reply by SFN

Many points were raised in reply by counsel for the SFN. At times, the assertions made were in the nature of what should have been, in the Board's view, sworn or adopted evidence, though were disclaimed by counsel for the SFN as being provided for context as part of reply argument. To that extent, where those assertions were made, but not supported by the record, the Board has not considered them.

According to counsel, the Traditional Land Use Study is incomplete because of concerns raised by the SFN. In support of this assertion, counsel pointed to section 4.3.6 of the Traditional Land Use Study which deals with the limits of the study. Furthermore, the Net Benefits working group participation for that study was inadequate. Counsel also argued that the Traditional Land Use Study was conducted only in respect of Jasper National Park. As well, according to counsel, a one day helicopter tour with the SFN tagging along cannot be considered adequate participation in a Traditional Land Use Study which, in and of itself, was not adequate to consider impact on traditional use. Participation in the Traditional Land Use Study was curtailed because the SFN did not have its own researcher. Furthermore, the company's process is

problematic because no chance has been afforded to the SFN to address the concerns raised in the Traditional Land Use Study.

In essence, the SFN has tried its best to participate but there have been capacity considerations all along. As well, there have been time constraints in considering the Terms of Reference and other regulatory processes. Counsel argued that the SFN tried its best to contribute, but there were not enough resources and, more importantly, there was not enough time to conduct independent studies and make reasonable contributions to Terasen's environmental assessment and the Terms of Reference.

Counsel raised the issue of other parties, notably Terasen, saying that the SFN had been asked for their input but remained silent. Counsel submitted to the Board that silence in the SFN culture is not acquiescence. In the SFN's view, there needed to be active engagement, by Terasen and others, in the face of silence. At the end of the day, the Board must balance the SFN's interests and the public's interests and find in favour of the SFN.

Counsel for the SFN responded to Terasen's argument regarding the offer of funding made by Terasen. In the SFN's view, that offer was made to environmental non-governmental organizations and not specifically to Aboriginal First Nations As for the MOU, counsel asked "why was there a signing ceremony"?, presumably to imply that there would not have been one if it had not been the intention of the SFN to create obligations, not just objectives. Furthermore, according to counsel, the objective of the MOU was to ensure that development adheres to traditional land use by the SFN.

In reply to CAPP, counsel argued that Crown consultation must be meaningful and in order for that to occur, the SFN need a chance to provide more information to the Board. In the *Taku*[13] case, the First Nation hired their own expert. In the case before the Board, the SFN did not have their own expert, and therefore the Traditional Land Use Study was not shaped by SFN concerns as it was in the *Taku*[14] case. Furthermore, there is a process for the land in British Columbia to be dealt with by that province's legislature at the earliest in the spring of 2007, such that a delay in this process would allow for the Simpcw to ensure that information is put before this Board.

As for capacity and funding, in response to counsel for CAPP, counsel cited the *Okanagan*[15] case in which the courts of British Columbia ordered interim costs to a First Nation who demonstrated poverty so that its members could participate in litigation to defend their right to log on Crown land over which they asserted Aboriginal rights and title.

Counsel then commended to the Board its own March 2006 Q&A document entitled "Consideration of Aboriginal Concerns in National Energy Board Decisions" and submitted that the document would be fully engaged and met if the Board were to grant the SFN's Motion for time to provide more evidence.

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[13] *Supra* note 10.
[14] *Ibid.*
[15] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 S.C.C. 71, [2003] 3 S.C.R. 371.

Views of the Board

The Board heard many and varied arguments both in support of and against the Motion. While it has taken all of these arguments into account in coming to its decision on the Motion, the Board is of the view that, in essence, it is being asked to extend the timelines by six months on the basis of procedural fairness for the following reasons: Terasen has not afforded enough opportunity to the SFN to participate in Terasen's section 52 application; the SFN have had insufficient time to participate in the Board's regulatory process; and the SFN have not had enough opportunity to participate in the CEAA environmental assessment process. The Board points out that its assessment of the facts here is only for the purposes of the Motion. The Board must assess evidence for Terasen's section 52 application separately and it will do so.

Burden of Proof

While no party raised the issue of burden of proof in a formal way, as a preliminary issue, the Board must decide whether or not the SFN have fulfilled the burden of proving their case on the Motion. In the Board's GH-2-87 Reasons for Decision,[16] and more recently in RH-R-2-2005,[17] the Board set out as follows:

> "Burden of proof" is a fundamental concept in proceedings before a Court. If a party is unable to satisfy the burden cast upon it, the Court has no option but to deny the relief sought by that party, thereby ruling in favour of that party's adversary.

In this instance, the Board is of the view that the SFN have not met that burden on the basis that the SFN did not file any sworn or affirmed evidence in support of the Motion to delay the proceedings. The SFN filed no affidavit in support of the Motion setting out why the processes were not procedurally fair, nor was any evidence led on the hearing record to that effect.

After argument on the Motion concluded, counsel for Terasen noted for the Board that issues both he and counsel for the SFN raised in argument are issues that would be ordinarily be discussed by witnesses in cross-examination and that such witnesses would be available to speak to those issues when the evidence on the section 52 application was being heard. A witness for the SFN, Chief Matthew, took the stand and adopted the only document submitted as evidence by the SFN in the proceeding, that being the SFN Consultation and Accommodation Guidelines (and attached Referrals Processing System and map of the SFN Traditional Territory). In cross-examination, counsel for Terasen asked Chief Matthew if there were any other documents filed by the SFN on the record as evidence, to which Chief Matthew responded not as far as he knew. Counsel for Terasen then asked if Chief Matthew had anything else he wished to add to the filed document, to which the Chief replied "not at this time."

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[16] TransCanada Pipelines Limited, GH-2-87, Applications for Facilities and Approval of Toll Methodology and Related Tariff Matters, Reasons for Decision, July 1988.
[17] Coral Energy Canada Inc. and the Cogenerators Alliance, RH-R-2-2005, Review of RH-2-2004 Phase I Decision, Reasons for Decision, May 2005.

As well, the Board heard counsel for the SFN cross-examine Terasen's environmental panel on several of the issues raised in the Motion, however in the Board's view, such cross-examination failed to support the SFN's case. If anything, such a cross-examination only resulted in confirmation of Terasen's attempts to engage the SFN in its processes. No evidence was presented to the contrary.

The Board is of the view that because no evidence in support of the Motion was filed, nothing has changed as a result of the Motion. Therefore, the Board can come to no other conclusion than that the SFN has not met the burden of proof in establishing that procedural fairness has not been followed justifying a six month delay in the proceeding. On that basis alone, the SFN Motion is denied.

Having determined that the SFN has not met its burden of proof, and that the Motion is denied on that basis, the Board could end the matter here. However, for the sake of completeness, the Board will continue on with views of the Motion.

Procedural Fairness as Against Terasen

The Board notes, at the outset, that counsel for the SFN cited no case law for the proposition that an applicant is under a duty to provide procedural fairness. The Board sets out its expectations of companies through the criteria found in the Board's Filing Manual and generic Information Request[18] it issues and did issue to Terasen in March 2006. These criteria, if followed by a company, require early engagement with groups that may be affected by a project. The Board also notes counsel for the SFN set out that the SFN did participate in the process for the Traditional Land Use Study.

Beginning with the Terms of Reference leading up to the CEAA process, it is not clear to the Board, from the SFN's submission, why only minimal mention of First Nations in the Terms of Reference is relevant to support an argument that the SFN were not meaningfully engaged in the process. The Board notes that of several mentions of First Nations or traditional use made in the Terms of Reference, one is taken directly from the definition of environmental effects in the *CEAA*. As part of the definition of environmental effects, traditional land and resource use by First Nations must be taken into consideration when assessing a project, as was pointed out by Terasen's counsel. Furthermore, the Board notes that the Terms of Reference, in addition to setting out requirements of Responsible Authorities other than the Board, is based on Board's Filing Manual, which sets out the Board's expectations for environmental assessment including consideration of traditional land and resource use by Aboriginals.

However, the real issue, in the Board's view, is the SFN's ability to participate in setting the Terms of Reference. The SFN led no evidence to demonstrate to the Board what more the SFN would have liked to see in the Terms of Reference that was not already included or what they

[18] Attachment titled "Information to be Filed with Applications Where there May be an Aboriginal Interest" to Board letter dated 3 August 2005, "Implications of Supreme Court of Canada Decisions on the National Energy Board's Memorandum of Guidance on Consultation with Aboriginal People".

would have liked to have seen done differently. The Board notes that, from the evidence on the record, on at least two occasions, participants to the environmental issues consultation meetings, of which SFN was one, were invited to comment on the Terms of Reference. The evidence demonstrates that when the SFN did not comment on the Terms of Reference by the first deadline of 15 July 2005, Terasen extended the deadline to 25 July 2005. Still no comments or concerns were raised. The evidence further shows that when a final copy of the Terms of Reference was sent to the SFN, Terasen indicated that comments or concerns could be directed to the CEA Agency. There was no evidence to show that comments were ever made or received.

Counsel for the SFN alleged time constraints in considering the Terms of Reference but no evidence was led to support this allegation. As well, while counsel for SFN argued that silence does not mean acquiescence in SFN culture, with respect, no evidence was lead to support this assertion and there is nothing that SFN counsel pointed to on record to show that the SFN informed Terasen of this tradition such that Terasen would have been made aware. Last, counsel mounted the argument that the SFN have only just retained counsel, but no evidence was presented to show why counsel could not have been retained earlier.

Turning to the MOU, in considering the *Baker*[19] case, the Board is of the view that this case does not support the SFN's legitimate expectation argument. Rather, the doctrine of legitimate expectations, as dealt with in *Baker*,[20] is based on the principle that the circumstances affecting procedural fairness must take into account the promises or regular practices of administrative decision-makers. In this instance, the SFN have not shown how a duty imposed on an administrative decision-maker is transposed onto a party to an MOU that, itself, creates no obligations but rather sets out objectives which each party desires to achieve.

In any event, the Board is of the view that an MOU signed between two parties to a regulatory proceeding and which sets out future intentions to conclude agreements is not determinative of the Board's decision on an application. The fact that there is an MOU between the SFN and Terasen can be one indicator of engagement. However, in the Board's view, there is no pre-condition that a Joint Working Agreement contemplated in the MOU be concluded for the Board to carry out its regulatory assessment.

It is apparent to the Board, from what is contained on the record before it, that the SFN participated in the Traditional Land Use Study. The SFN provided a description of land and resource use and proposed the mitigation in the traditional land use for Terasen to incorporate. Additionally, evidence was given in cross-examination that the SFN had no concerns with the Traditional Land Use Study, as it was drafted, being forwarded to the National Energy Board. No evidence to the contrary was presented.
On cross-examination by SFN counsel, Terasen's environmental witness panel set out that consultation with the SFN on base data collection goes back to September 2004. They clarified that a helicopter ride was done to accommodate elders because some of the areas examined were

[19] *Supra* note 1.
[20] *Ibid.*

difficult to reach. However, according to the Terasen witnesses, there was more participation than just the helicopter ride. Terasen witnesses set out that there was ground reconnaissance from the East gate of Jasper all the way through the route. As well, one representative of the SFN participated in archaeological studies in which he wrote 25 days of information that was gathered through archaeological investigation.

The Board notes that counsel for the SFN stated that the Traditional Land Use Study only took into account the proposed right-of-way in Jasper National Park. The Board can only conclude that counsel misspoke himself, because the evidence on the record indicates that the Traditional Land Use Study follows the entire proposed right-of-way and no evidence to the contrary was led.

Absent evidence to the contrary, there is nothing to lead Board to conclude that the SFN were not able to participate in the Traditional Land Use Study.

Considering now the issue of the environmental assessment process, the Board looked at several aspects. First, the evidence commended to the Board demonstrates that the SFN were involved, as early as September 2004, in data collection along the proposed right-of-way that they have claimed as traditional territory. Terasen's witnesses gave evidence that on 30 September 2004 when Terasen employees met with the SFN, the SFN emphasized the technical expertise that their community could offer to the environmental assessment component, and it was at that time that they highlighted that they would have capacity to offer in fisheries, vegetation, and in wildlife. Between 20 September 2004 and 15 October 2004, two of their experts were engaged in the fisheries data collection, and one of their experts was engaged in the wildlife fall data collection. Following that, in 2005, there were nine technical experts that participated in the environmental field studies. The evidence showed that certain SFN members were retained and paid by Terasen for that expertise.

Additionally, the SFN participated in each of the four environmental issues consultation meetings. The evidence shows that a representative of the SFN was present when environmental non-government organizations raised the issue of participating more fully in Terasen's environmental assessment process by having their own experts funded by Terasen. The evidence in cross-examination shows that the SFN were considered by Terasen to be environmental non-government organizations for the purpose of addressing environmental issues. Terasen witnesses further stated on cross-examination that, at the last environmental issues consultation meeting when independent reports were presented, it would have been apparent to parties that one group had been offered opportunity and took advantage of retaining outside expertise funded by Terasen.

When asked by SFN counsel if Terasen would have provided funding to the SFN had the SFN asked, the Terasen witness responded in the affirmative. Moreover, the evidence demonstrated that the SFN were asked for comments on environmental assessment on several occasions, and, that, at the SFN's request, Terasen created a separate engagement process to discuss other areas

of interest to the SFN such as the MOU and the positive and negative impacts of the Project on local communities.

For the purposes of the Motion, the Board can only conclude, based on the evidence before it, that the SFN were provided numerous opportunities to not only participate in the environmental assessment process set out by Terasen, but to also raise any concerns about how the process was unfolding and that they did not to do so.

Procedural Fairness as Against the Regulatory Authorities

The SFN also allege that they have not been treated in a procedurally fair manner in regulatory processes, though there was no specific elaboration on what processes were being referred to. To the extent that counsel was referring to the establishment of the Terms of Reference by Responsible Authorities, the Board has already disposed of the issue. To the extent that the process referred to is the process related to the Screening of the Project, it will be dealt with in the following section of this Ruling.

To the extent that the process referred to is the Board's own regulatory process, the Board's views are as follows. At the opening of his argument, counsel cited the *Baker*[21] case for the proposition that the values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decision.

The Board notes that, as a quasi-judicial tribunal, its processes are designed to comply with the rules of natural justice one of which is procedural fairness. These processes have stood the test of time. In the circumstances of this case, in all instances save two the Board has followed its usual process as set out at the beginning of this decision. The two instances where it deviated were, in the first instance, to allow the SFN to file its intervention late, because the Board determined that no party would be prejudiced and, in the second instance, to allow the SFN to file its evidence late. In both instance, the Board granted this relief on its own motion.

The SFN were given the opportunity to participate in the Board's process. The Board set out, at the beginning of this Ruling, the relevant dates for intervenors to participate in the Hearing. The SFN did take the opportunity to participate: the SFN intervened, filed evidence, cross-examined Terasen's witnesses and argued against the section 52 application being granted at this time.

[21] *Supra* note 1.

Furthermore, the Board asked information requests of Terasen specific to concerns raised by the SFN in Terasen's Traditional Land Use Study. In particular, the Board noted mention by the SFN in the Traditional Land Use Study of the need for further study and the desire to be involved in planning and monitoring related to resources in their territory. In accordance with the its own standard practice, the Board followed up with Terasen on these comments by asking, in Information Requests 1.37 and 1.38, how Terasen intended to address those concerns.

In response, Terasen answered that Aboriginal groups would be involved in additional field work related to, or other mitigation, for each specific issue raised, including Aboriginal historic sites and Aboriginal medicinal plants and berries, avoiding wetlands and Aboriginal hunting outside of parks. Terasen also answered that they were involved in discussions with the SFN regarding the level of involvement by the SFN in aspects of monitoring during construction, restoration and operation.

CEAA process complaint

As with other Responsible Authorities, the Board is of the view that a Comprehensive Study is not a discretion left open to the Board for determination. In other words, a project must fit within the CEAA *Comprehensive Study List Regulations* to be subject to a Comprehensive Study. In this instance, a preliminary assessment of the Project by Responsible Authorities indicated that the Project did not fall within the requirements of those Regulations. Thus, a Screening level of assessment is what is required.

In any event, as counsel for Terasen noted, the Terms of Reference set out that the Project is subject to the factors required for a Comprehensive Study which are found in subsections 16(1) and 16(2) of the CEAA despite the fact that the Project is subject to a Screening and thus would otherwise only subject to the factors set out in subsection 16(1) of that Act.

With respect to the argument that the environmental assessment should have been considered by Panel Review, the Board notes that at the time consideration was given to establishing the appropriate process, no party raised concerns which would have suggested that a Panel Review was warranted. The Board notes that the CEAA contemplates that where a Responsible Authority cannot make a determination as to the significance of an environmental effect or is of the opinion that public participation warrants a Panel Review that responsible authority must refer the project to the Minister for either a mediation process or a review panel process. With respect to its own environmental assessment process, the Board notes that there is still the opportunity for public comment on the Screening. After that period has elapsed, the possibility of a Review Panel is not foreclosed.

Regarding the SFN's complaint about the Terms of Reference and scope of the Project, the Board has dealt with that issue earlier in this ruling.

Again, specific to the CEAA process complaint letter, the SFN stated its expectation that the Crown actively engage in consultation and accommodation with the SFN. The Board notes that, in response to this issue, the various Responsible Authorities will be contacting the SFN about these potential obligations when they are in a position to make decisions on the Project. The Board is of the view that regulatory processes of the federal authorities owing a duty to consult and accommodate are ongoing and therefore any consultation and accommodation duties will continue.

Conclusion

In this instance, the Board is of the view that procedural fairness has been accorded to the SFN. With respect to Terasen, as set out above, the SFN were afforded numerous opportunities to be involved in its processes. With respect to regulatory authorities, there are ongoing opportunities. With respect to the Board's own process, the SFN were given the opportunity to participate in the process and in fact did participate in the process by intervening, by filing evidence, by cross-examining and by submitting argument.

The Board is of the view that parties to a regulatory proceeding, including First Nations, are under an obligation to raise issues in a timely way in order to allow the applicant to respond. Furthermore, although the SFN has a right to expect procedural fairness, so do other parties. As such, the Board has to weigh the lateness of this submission against the rights of other parties and, in particular, the right of the applicant to have its application heard in a timely manner.

When these two considerations are compounded by the fact that argument by counsel for the SFN in both the Motion and on the application contain allegations which are unsupported by evidence and thus do not discharge the burden of proof, it is clear to the Board that the Motion must be dismissed.

Yours truly,

Michel L. Mantha
Secretary

Appendix III

Certificate Conditions

For the purposes of all of the conditions, the Commencement of Construction includes the clearing of vegetation, ground-breaking and other forms of RoW preparation that may have an effect on the environment, but does not include activities associated with normal surveying operations.

General

1. Unless the Board otherwise directs, Terasen shall cause the approved Project to be designed, located, constructed, installed, and operated in accordance with the specifications, standards and other information referred to in its application, as otherwise agreed to during questioning in the OH-1-2006 proceeding and in its related submissions.

2. Unless the Board otherwise directs, Terasen shall implement or cause to be implemented all of the policies, practices, programs, mitigation measures, recommendations and procedures for the protection of the environment included in or referred to in its application or as otherwise agreed to during questioning in the OH-1-2006 proceeding or in its related submissions.

3. Terasen shall maintain at its construction office(s):

   (a) an updated Commitments Table listing all regulatory commitments, including but not limited to all commitments resulting from:

      i) the NEB application and subsequent filings;

      ii) undertakings made during the OH-1-2006 proceeding; and

      iii) conditions from permits authorizations and approvals.

   (b) copies of any permits approvals or authorizations for the applied-for facilities issued by federal, provincial or other permitting agencies, which include environmental conditions or site-specific mitigative or monitoring measures; and

   (c) any subsequent variations to any permits, approvals or authorizations.

Prior to the Commencement of Construction

4. Terasen shall file with the Board, at least 30 days prior to the Commencement of Construction of the approved facilities, or as otherwise directed by the Board, Terasen's Project specific internal standards and practices referenced in its application and related submissions in the OH-1-2006 proceeding.

5. Unless the Board otherwise directs, Terasen shall file with the Board for approval, at least 30 days prior to the Commencement of Construction of the approved facilities, an updated, Project-specific Environmental Protection Plan (EPP) and Restoration Plan. The EPP and Restoration Plan shall be a comprehensive compilation of all environmental protection procedures, mitigation measures, and monitoring commitments, as set out in Terasen's application for the Project, subsequent filings or as otherwise agreed to during questioning in the OH-1-2006 proceeding or in its related submissions, including the results of supplementary studies conducted in 2006, and updated Environmental Worksheets. The Environmental Protection Plan and the Restoration Plan shall also include:

   (a) specific mitigation and reclamation for calcium-rich surface soils for stabilization and re-vegetation;

   (b) the detailed habitat mapping for each of the 34 watercourses identified in the Terasen fisheries assessment as being fish-bearing; and

   (c) each location where installation of unique habitat features in watercourses will be applied.

   Construction shall not commence until Terasen has received approval of its EPP and Restoration Plan from the Board.

6. Unless the Board otherwise directs, Terasen shall file with the Board, prior to the Commencement of Construction, a pre- and post- construction Follow-up Program for wetland function that includes:

   Pre-construction:

   (a) on a map or worksheet, the locations of the follow-up for wetland function;

   (b) the measures to be applied, and an assessment of the anticipated effectiveness of the proposed mitigation and restoration strategy;

   (c) the schedule for implementing the measures as set out in b);

   (d) evidence demonstrating that Parks Canada Agency (PCA), B.C. Ministry of Environment (BC MOE) and Environment Canada have reviewed and commented on the Program;

   Post-construction:

   (e) the results, evaluation and recommendations for managing wetland resources;

   (f) the schedule Terasen shall implement to address any unresolved concerns; and

   (g) a schedule for filing follow-up reports for wetland function with the Board.

7. Terasen shall file with the Board, 30 days prior to ground breaking at the former gas station and at the storage tanks located at KL 332.8, the Site Specific Construction Plan for safety and environmental protection.

8. Terasen shall notify the Board 14 days prior to the commencement of excavation of any watercourse crossing that has been assessed for fish and fish habitat.

9. Terasen shall file the Fisheries and Oceans Canada Compensation Plan with the Board, at least 14 days prior to the planned start of excavation at watercourses identified in the Plan.

10. In the event of clearing within the restricted activity period for migratory birds (between 1 May and 31 July), Terasen shall retain a qualified avian biologist to carry out a survey to identify any migratory birds and nests. The spatial boundaries of the survey will include at least 30 m beyond the disturbance footprint for migratory birds and 100 m beyond the disturbance footprint for raptors, of the Project. Terasen shall file with the Board:

    (a) evidence to confirm that Environment Canada has reviewed and commented on the proposed methods for the survey;

    (b) the results of the survey; and

    (c) mitigation strategies developed in consultation with Environment Canada to protect any identified migratory birds or their nests.

During Construction

11. Terasen shall file with the Board, on a monthly basis, construction progress reports. The report shall include an updated construction schedule identifying major construction activities, information on activities carried out during the reporting period, any environmental and safety issues and non-compliances, and measures undertaken for the resolution of each issue and non-compliance.

12. Terasen shall file with the Board, at least 30 days prior to the commencement of any blasting activities, or as otherwise directed by the Board, the Project specific blasting procedures and safety precautions to be implemented during blasting activities.

13. Unless otherwise directed by the Board, Terasen shall use blasting mats for all blasting activities, in addition to design controls, to control fly rock during all blasting activities.

14. Terasen shall file with the Board, within the time specified, or as otherwise directed by the Board, an updated version of the following programs and procedures:

    (a) the field joining program 14 days prior to joining;

    (b) the tie-in welding procedures if the metallurgical tests indicate that the carbon equivalent levels at the tie-in locations exceed 0.5 percent, or written confirmation

from Terasen indicating the carbon equivalent levels at the tie-in locations does not exceed 0.5 percent 14 days prior to joining; and

(c) the field pressure testing program 14 days prior to pressure testing.

15. Terasen shall file with the Board, at least 30 days prior to submission of leave to open application(s), or as otherwise directed by the Board, an updated Emergency Preparedness and Response Plan for the Project and shall notify the Board of any modifications to the plan as they occur. In preparing its Emergency Preparedness and Response Plan, Terasen shall refer to Board letter dated 24 April 2002 entitled Security and Emergency Preparedness Programs addressed to all oil and gas companies with facilities under the jurisdiction of the National Energy Board.

16. In the event Terasen discovers, at previously unidentified locations, any substance present in the soil, surface water or groundwater at a concentration greater than the applicable Federal or Provincial Regulations, Standards or Guidelines, Terasen shall file with the Board, within 45 days of discovery, a Remediation Plan including at the minimum:

(a) a summary of the data collected;

(b) a map that outlines the affected areas and sample locations;

(c) design methodology and sampling used;

(d) a list of the contaminants of concerns to be addressed;

(e) remediation objectives to be achieved;

(f) methods by which remediation will be conducted; and

(g) a detailed schedule for the implementation of the Remediation Plan.

Post Construction

17. Within 30 days that the approved Project is placed in service, Terasen shall file with the Board a confirmation, by an officer of the company, that the approved Project was completed and constructed in compliance with all applicable conditions in this Certificate. If compliance with any of these conditions cannot be confirmed, the officer of the company shall file with the Board details as to why compliance cannot be confirmed. The filing required by this condition shall include a statement confirming that the signatory to the filing is an officer of the company.

18. For the first year following the commencement of operation of the Project, then each year following, up to and including the fifth year, Terasen shall file with the Board, PCA, DFO and BC MOE, a post-construction environmental monitoring report on or before the 31st January that:

(a) provides a summary of the effectiveness of the environmental mitigation measures applied during construction;

(b) identifies deviations from plans and alternate mitigation applied as approved by the Board;

(c) identifies locations on a map or diagram where corrective action was taken during construction and the current status of corrective actions;

(d) provides proposed measures and the schedule Terasen shall implement to address any unresolved concerns; and

(e) specifically includes an evaluation of the success of:

i) re-vegetation as measured against a 85% survival rate of recommended plantings for vegetation in the riparian areas near watercourses;

ii) non-native plant vegetation management;

iii) containment of the spread of non-native fish species in Jasper National Park and Mount Robson Provincial Park;

iv) reclamation on calcium-rich surface soils as identified on the Environmental Worksheets; and

v) reduction of the potential acceleration of the spread of forest health pathogens.

Expiration of Certificate

19. Unless the Board otherwise directs prior to 31 December 2008, this certificate shall expire on 31 December 2008 unless the construction of the approved facilities has commenced by that date.

Appendix IV

Terasen Environmental Issues Consultation Meetings

Attendees:

- Canadian Environmental Assessment Agency
- National Energy Board
- Parks Canada
- Simpcw First Nation
- Trout Unlimited Canada
- Canadian Parks and Wilderness Society (CPAWS), Calgary / Banff Chapter
- CPAWS, BC Chapter
- BC Ministry of Water, Land & Air Protection
- Environment Canada
- Yellowstone to Yukon Conservation Initiative
- Aseniwuche Winewak Nation of Canada
- Jasper Environmental Association
- Ministry of Water, Land and Parks
- Ministry of Energy, Mines and Petroleum Resources
- Métis Regional Council, Métis Nation Zone IV
- Ministry of Environment Parks and Protected Areas
- Fraser Headwaters Alliance
- Nakcowinewak Nation of Canada
- Métis Opportunities Company, Métis Nation Zone IV
- Rocky Mountain Elk Foundation
- BC TapWater Alliance

Regrets:

- Alberta Fish & Game Association
- David Suzuki Foundation
- World Wildlife Fund, Pacific Region
- Sierra Legal Defense Fund
- CPAWS, National
- Nature Canada
- Federation of British Columbia Naturalists
- Sierra Club of Canada – Prairie
- Western Canada Wilderness Committee
- West Coast Environmental Law
- Chetwynd Environmental Society
- Jasper Environmental Association
- Federation of Alberta Naturalists
- The Pembina Institute for Appropriate Development
- Alberta Wilderness Association
- Model Forests Grizzly Bear
- Friends of Jasper National Park
- Métis Opportunities Inc.